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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 47

FOX FILM CORPORATION, PETITIONER,

vs.

A. B. MULLER.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR CERTIORARI FILED MAY 9, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

SUPREME COURT OF THE UNITED STATES

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State of Minnesota

In Supreme Court

1933

STATE OF MINNESOTA, DISTRICT COURT.
County of Hennepin. Fourth Judicial District.

FOX FILM CORPORATION,
Plaintiff,

vs.

A. B. MULLER,
Defendant.

SUMMONS.

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which complaint is hereto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their office, 654 Security Building, in the City of Minneapolis, in the said County of Hennepin, within Twenty (20) days after service of this summons upon you, exclusive of the day of such service; and

if you fail to answer the said complaint within the
4 time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in said complaint.

Dated November 3, 1930.

SHEARER, BYARD & TROGNER,
Attorneys for Plaintiff,
654 Security Building,
Minneapolis, Minn.

COMPLAINT.

5 (Title of Cause.)

Comes now the plaintiff above named and for its First Cause of action against defendant respectfully shows and alleges:

1. That all times hereinafter named plaintiff was and now is a corporation organized and existing under the laws of the State of New York and duly admitted and qualified to transact business in the State of Minnesota as a foreign corporation.

2. That at all times hereinafter alleged plaintiff was engaged in the business of producing, owning,
6 distributing and licensing under copyright, motion picture films and photo plays to motion picture theatres for public exhibition purposes, under written agreements.

3. That at all times hereinafter mentioned defendant was and now is the owner and operator of a motion picture theatre known as Rex Theatre, situated in the City or Town of Maple Lake, Wright County, State of Minnesota.

4. That on or about the 6th day of September, 1929, plaintiff and defendant entered into a written agreement dated on that day, wherein and whereby the plaintiff granted to the defendant a limited license under copyright, to exhibit at defendant's said theatre in the City or Town of Maple Lake, Wright County, Minnesota, the following named pictures at the times and under the terms and conditions in said contract specified, to-wit:

Name	Minimum Guaranteed Film Rental	Score Charge	
Sunny Side Up	$50.00	$12.50	plus 50% of the gross receipts in excess of $200.00
Cameo Kirby	$50.00	$12.50	"
Married in Hollywood	$50.00	$12.50	"
Follies of 1930	$50.00	$12.50	"
Cheer Up and Smile	$50.00	$12.50	"
Women Everywhere	$50.00	$12.50	"
Golden Calf	$50.00	$12.50	"
High Society Blues	$50.00	$12.50	"
Good Intentions	$50.00	$12.50	
Such Men Are Dangerous	$35.00	$12.50	
So This Is London	$35.00	$12.50	
South Sea Rose	$35.00	$12.50	
Happy Days	$35.00	$12.50	
The Sky Hawk	$35.00	$12.50	
Men Without Women	$35.00	$12.50	
Four Devils	$35.00	$12.50	
The Lone Star Ranger	$30.00	$10.00	
On the Level	$30.00	$10.00	
Arizona Kid	$30.00	$10.00	
Why Leave Home	$30.00	$10.00	
The Girl From Havana	$30.00	$10.00	
City Girl	$30.00	$10.00	
Christina	$30.00	$10.00	
Harmony at Home	$30.00	$10.00	
Seven Faces	$25.00	$10.00	
Double Crossroads	$25.00	$10.00	
One Mad Kiss	$25.00	$10.00	
Rough Romance	$25.00	$10.00	
Love, Live and Laugh	$25.00	$10.00	

Name	Minimum Guaranteed Film Rental	Score Charge
Romance of the Rio Grande....	$25.00	$10.00
Big Time	$25.00	$10.00
Passing of the 3rd Floor Back..	$25.00	$10.00
Born Reckless	$25.00	$10.00
Crazy That Way.....	$25.00	$10.00
Big Party	$20.00	$10.00
Let's Go Places.....	$20.00	$10.00
Wild Company	$20.00	$10.00
Not Damaged	$20.00	$10.00
Temple Tower	$20.00	$10.00
Song of Kentucky.....	$20.00	$10.00
Three Sisters	$20.00	$10.00
Nix on Dames.....	$20.00	$10.00
Total.....	$1,345.00	$460.00

That said above described pictures were all sound pictures, and synchronized by scores as shown in the second column above set forth. And in consideration of said contract and the licenses to exhibit said pictures as therein provided, the defendant promised and agreed to exhibit each of said pictures at his said theatre at the times and for the number of consecutive days as provided in said contract, and to pay the plaintiff therefor the respective sums as set opposite said respective pictures as guaranteed film rental and for the said score or recording fee. That the total guaranteed film rental of said pictures was the sum of Thirteen Hundred Forty-five $1345.-00) Dollars, and the total sum of the recording fee or score charge for said pictures amounts to Four Hundred Sixty ($460.00) Dollars, in all the sum of Eighteen Hundred Five ($1805.00) Dollars, which

defendant agreed to pay plaintiff for the exhibition of said pictures under said contract.

5. That according to the terms of said contract and in addition to the sums above mentioned, the defendant agreed to pay plaintiff for the exhibition of each of the first nine of said pictures, 50 per cent of the gross admission receipts in excess of Two Hundred ($200.00) Dollars from the showing of each of said nine pictures as additional consideration for the use and exhibition thereof.

That in paragraph showing "Approved Additional Clauses" of said contract, it was provided as follows

"If the license fee of any photo play licensed hereunder is to be computed either in whole or in part, upon a percentage of the gross admission receipts of said theatre, and if the Exhibitor fails or refuses to exhibit such photoplay as provided in this contract, the exhibitor shall pay to the distributor as liquidated damages for each day that the exhibitor fails or refuses to exhibit such photoplay (in addition to any fixed sums payable hereunder in respect of such photoplay) a sum equal to such percentage of the average daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to the date or dates when such photoplay should have been so exhibited. * * *"

And plaintiff alleges on information and belief that under said clause of said contract, the liquidated damages resulting from the refusal of defendant to exhibit said pictures would amount to not less than Twenty-five ($25.00) Dollars for each

of the first nine pictures above described, in all
16 the sum of Two Hundred Twenty-five ($225.00) Dollars.

6. That plaintiff in accordance with the terms and conditions of said contract made each of said pictures above described available for defendant's use, and notified him thereof in writing and tendered said motion pictures to the defendant for exhibitions in his said theatre; but that the defendant wrongfully and unlawfully refused to accept or exhibit the same or any thereof, and/or to
17 pay the said sums provided in said contract therefor respectively, or any part thereof. That plaintiff has kept and performed each and all of the terms and conditions in said contract contained on its part to be kept and performed, and has been ready and willing at all times so to do; but defendant has failed, neglected and refused to perform his part of said contract and has committed a breach thereof.

7. Plaintiff further alleges that pursuant to availability notice previously given to defendant,
18 and at his request plaintiff shipped by express the following pictures described in the foregoing contract, to defendant for exhibition at his said theatre to-wit: *Devils, The Man From Havana,* and *Married In Hollywood,* but defendant failed and refused to receive or exhibit said pictures and they were returned to plaintiff at an expense paid by plaintiff for carriage charges in the sum of Six & 88/100 ($6.88) Dollars, which is due, and no part of which has been paid although demanded.

8. That by reason of the premises plaintiff has

been injured and damaged in the sum of Two Thousand Thirty-six & 88/100 ($2036.88) Dollars and interest thereon from the 14th day of July, 1930.

II.

For its Second Cause of Action against defendant plaintiff alleges:

1. Plaintiff realleges and makes a part of this cause of action all the allegations contained in paragraphs 1, 2 and 3 of the First Cause of Action, as fully as if set forth at length herein.

2. That on or about the 6th day of September, 1929, plaintiff and defendant entered into a written agreement dated on that day, wherein and whereby the plaintiff granted to the defendant a limited license under copyright, to exhibit at defendant's said theatre in the City or Town of Maple Lake, Wright County, Minnesota, the following named pictures at the times and under the terms and conditions in said contract specified, to-wit:

Names	Guaranteed fee rental
Knights Out	$10.00
All Steamed Up	$10.00
Hired And Fired	$10.00
Detectives Wanted	$10.00

That in consideration of said contract and the licenses to exhibit said pictures as therein provided, the defendant promised and agreed to exhibit each of said pictures at his said theatre at the times and for the number of consecutive days as provided in said contract, and to pay the plaintiff therefor the

respective sums as set opposite said prospective
22 pictures as guaranteed film rental.

3. That plaintiff in accordance with the terms and conditions of said contract made each of said pictures above described available for defendant's use, and notified him thereof in writing and tendered said motion pictures to the defendant for exhibition in said theatre; but that the defendant wrongfully and unlawfully refused to accept or exhibit the same or any thereof, and/or to pay the said sums provided in said contract therefor respectfully, or any part thereof. That plaintiff has kept
23 and performed each and all of the terms and conditions in said contract contained on its part to be kept and performed, and has been ready and willing at all times so to do; but defendant has failed, neglected and refused to perform his part of said contract and has committed a breach thereof.

4. Plaintiff further alleges that pursuant to availability notice previously given to defendant, and at his request plaintiff shipped by express the following picture described in the foregoing con-
24 tract, to defendant for exhibitions at his said theatre to-wit: *All Steamed Up,* but defendant failed and refused to receive or exhibit said picture and it was returned to plaintiff at an expense paid by plaintiff for carriage charge in the sum of Two & 04/100 ($2.04) Dollars, which is due and no part of which has been paid although demanded.

5. That by reason of the premises plaintiff has been injured and damaged in the sum of Forty-two

& 04/100 ($42.04) Dollars and interest thereon from the 11th day of July, 1930.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Two Thousand Seventy-eight & 92/100 ($2078.92) Dollars, with interest from the 11th day of July, 1930, together with the costs and disbursements of this action.

Dated 3, 1930.

SHEARER, BYARD & TROGNER,
Attorneys for Plaintiff,
654 Security Building,
Minneapolis, Minn.

(Title of Cause.)

AMENDED ANSWER.

Comes now the Defendant, and for his Amended Answer to the first cause of action of Plaintiff's Complaint herein:

I.

Admits Paragraphs One, Two and Three of said first cause of action; denies generally each and every other allegation, matter and thing contained in said first cause of action, save and except as is hereinafter specifically admitted, qualified or avoided.

II.

Further answering, this Defendant alleges that the contract set forth in the said cause of action was entered into under the following circumstances:

1. That at and for a long time prior to the making of the said contract, the Plaintiff was a producer

and distributor of motion pictures, producing and
28 distributing said pictures for shipment and sale in commerce between the several States of the Union, and that all of said times, the Defendant was and still is an exhibitor of motion pictures so produced and distributed by said Plaintiff and other producers and distributors of motion pictures in the United States.

2. That some time prior to the making of the said contract, said Plaintiff and other producers of motion pictures in the United States hereinafter referred to, controlled at least ninety eight per cent
29 (98%) of the production and distribution of motion pictures in the United States produced and distributed for shipment and sale in commerce between the several States; and that said Defendant was and is, that is in exhibiting such pictures in theatres throughout the United States, was of necessity compelled to do business with the said plaintiff and said other producers so controlling the production of said motion pictures and their distribution throughout the United States or to go out of business.
30

3. That said producers and distributors so referred to in the preceding two paragraphs will be hereinafter referred to as Distributors, and the exhibitors of motion pictures in theatres throughout the United States, of whom this Defendant is one, will hereinafter be referred to as exhibitors.

4. That said distributors hereinbefore referred to, prior to the making of said contract, did conceive the purpose of controlling the distribution of

motion pictures within the United States and in commerce between the several States on terms satisfactory to themselves and coercing all Exhibitors within the United States to do business with the said producers and exhibit such pictures in the United States upon terms determined by and satisfactory to the said distributors, or to compel such exhibitors not so consenting to go out of business. 31

5. That to the end aforesaid, and in violation of the Statutes of the United States and specifically the Sherman Anti-Trust Act, the said distributors so controlling 98% of the production and distribution of motion pictures for distribution in commerce between the several States, did criminally conspire and agree with each other and with the exhibitors, including this Defendant, that they would distribute their product throughout the United States in the manner hereinafter set forth and none other, and that no one would be permitted to sell or purchase or exhibit any motion pictures produced or distributed by any of said distributors within the United States, except under said plan and in conformity with said terms. 32

6. That pursuant to such criminal conspiracy and in order to carry the same out, it was then and there agreed between said producers and distributors and exhibitors hereinbefore referred to, that the terms upon which any of said distributors would sell and any exhibitor would be permitted to purchase should be embodied in a form of contract known as and hereinafter referred to as the 33

Standard Exhibition Contract; that none of said
34 distributors would sell or permit the exhibition of any of their products in the United States, except under the terms of said Standard Exhibition Contract to be signed by the particular producer and exhibitor in each instance entering into the contract, and in each such standard Exhibition Contract, the producer and distributor and exhibitor was required to warrant that the said pre-determined terms were all contained in such contract, and that no provision inconsistent with such pre-determined terms, was contained therein.

35 7. That by the terms of such Standard Exhibition Contract, every exhibitor was compelled to agree to the following:

(a) That in the event any of the photoplays, except road shows hereinafter referred to, licensed —that is permitted to be exhibited—under said contract were not generally released by the producer or distributor during the year following the making such contract, such motion pictures should be accepted and not covered by said contract unless the
36 Exhibitor gave written notice to the producer or distributor not later than 30 days after such last mentioned date, to-wit, the end of said year, and the distributor might exhibit or license the exhibition of such excepted photoplays, notwithstanding the fact that it had not generally been released under said contract.

(b) That the distributor should have the right under said contract to exhibit or cause to be exhibited as a road show any of said photoplays so

licensed, prior to their exhibition under said contract, by giving notice to the exhibitor within 14 37
days after the road show commenced, and that if said photoplay was so shown as a road show in the territory served by the exhibitor, such photoplay was excepted from the operation of said contract.

8. That the effect of said provisions hereinbefore marked (a) and (b) was that the exhibitor was bound to take and pay for all the photoplays licensed by the contract, but the producer and distributor was not bound as to any of the photoplays so licensed by the contract, but the producer and 38
distributor was not bound as to any of the photoplays so licensed, except as it paid him to consider himself bound; and that if in any case, the distributor found that as to any of said photoplays so licensed, it was more advantageous to distribute such photoplays otherwise, than under the said contract, the producer merely failed to generally release such photoplays, and then could exhibit them as and when desired by the distributor, and still not generally release it.

9. That among the other terms so agreed upon 39
as part of said conspiracy in restraint of trade between the States and contained in said Standard Exhibition contract, were the following:

(a). That every exhibitor would be required to pay for the license fee the sums agreed upon at least three (3) days in advance of the date of shipment from the distributor.

(b). That any payment made at the time of the

making of the contract should be credited upon the
40 liability thereunder last accruing instead of first accruing.

(c). That any photoplay was to be considered shipped when delivered to a common carrier or to the Postal authorities in time for its reaching the destination under said contract.

(d). That each Exhibitor was to be required to pay the distributor an agreed amount for the replacement of any foot of the prints lost or damaged.

(e). That no Exhibitor was to be permitted to
41 assign his contract or any interest therein without the written consent of the distributor and the written acceptance of the terms of such contract by such assignee.

(f). That all advertising accessories used by the Exhibitor in connection with the exhibition of such photoplays must be leased from or through the Distributor and must not be sold, leased or given away by the Exhibitor.

The purpose and effect of this provision was to permit the distributor to make additional profits on
42 the advertising literature used in connection with each photoplay, for which advertising literature the distributor could and did charge said exhibitor exhorbitant prices, and to prevent the exhibitor from purchasing such literature in the open market.

(g). That the Exhibitor would pay any tax based upon the delivery or exhibition of said photoplays or upon the sums payable under the said contract, and that if any statute or ordinance imposed such

tax upon the distributor, and the exact amount apportionable was not definite, said contract provided how such amount should be apportioned to that particular exhibitor. 43

(h). That no exhibitor would show any such motion pictures without charging therefor, and that the minimum fee charged should be not less than 10c unless a greater minimum charge was provided for expressly in the contract.

(i). That if the contract called for payment based as to any part thereof, upon the exhibitor's gross receipts, payment should be made daily. 44

(j). That in the event the license fee for any photoplay under any of the said contracts was based upon a percentage of the gross receipts of the Exhibitor, and the Exhibitor failed or refused to exhibit any such photoplay, that in each instance the exhibitor would pay the distributor a sum equal to such percentage of the average daily gross receipts of the exhibitor's theatre for and during the period of thirty (30) operating days immediately prior to the date when such photoplays should have been so exhibited. 45

10. That said Standard Exhibition Contract so-called contained other such predetermined terms to which all said exhibitors and distributors were compelled to conform under and pursuant to such unlawful agreement.

11. That in order to further coerce and compel the conformity of all persons entering into said scheme of distribution and especially exhibitors, so

acceding thereto and signing one of said contracts,
46 it was provided in said Standard Exhibition Contract and said parties to said conspiracy agreed that before any party thereto should resort to any Court to enforce or protect the legal rights of either each should submit such controversy to a Board of Arbitrators set up pursuant to said contract by certain rules or arbitrations, and that in order to further more effectually carry out the said plan to control the production and distribution of pictures throughout the United States, the said criminal conspiracy hereinbefore described, it was provided
47 in said rules of arbitration that the arbitrators should only have jurisdiction to determine the amount of damages which either party should pay to the other, but jurisdiction was expressly withheld from such arbitrators to determine the binding character of the contract, to the end that and with the purpose of preventing any exhibitor from raising the question of the unilateral character of the contract because of the provision hereinbefore referred to in Paragraph (a) and (b), and in order that the exhibitors could not raise the question of
48 the said criminal conspiracy and coercion before said board of arbitrators; and to the same end and purpose aforesaid, it was provided in said contract and all parties to said conspiracy agreed that if any exhibitor failed to abide by the award of such arbitrators, that all other producers and distributors within the United States who had become parties to said unlawful agreement and conspiracy should refuse to do business with such exhibitor

and should thereupon cancel all contracts existing between them and him, and in addition thereto the exhibitor should not be able to even go before said board of arbitration upon any default of any distributor existing towards him, and thereby the said exhibitor so refusing to abide by such arbitration was made a pariah or out-cast in the said business and would be compelled to go out of business altogether. 49

12. That the terms of said so-called Standard Exhibition Contracts were highly inimical to the interest of Exhibitors and said Exhibitors would not have agreed to such scheme, but were compelled to do so because of the strategic position held by the said distributor, who demanded the organization of said plan or scheme, and because of the fact that the said distributors controlled the distribution of 98% of all motion pictures in the United States and the said Exhibitors were compelled to agree to said scheme, and did agree thereto for the distribution of all motion pictures in the United States, and said Exhibitors got such clauses in said contract as said distributors would concede to them. 50

13. That after the determination of said plan or scheme and the formulation of said Standard Exhibition Contract, pursuant thereto, the said distributors and exhibitors began to carry out the distribution of said photoplays in commerce between the several states in accordance with same, and in the carrying out of said scheme of distribution and control and as part thereof, and pursuant to such 51

previous agreement had between said distributors
52 on the one hand including said plaintiff, and said exhibitors on the other hand, including this defendant, this defendant and said plaintiff signed the contract declared on in this cause of action for the distribution of the photoplays mentioned therein in the territory served by this exhibitor on the terms so predetermined and so agreed upon.

14. That by reason of the matters set forth hereinabove, the said contract was entered into as a component part of a criminal conspiracy and device to control the distribution of motion pictures in
53 commerce between the several States, and in violation of the Sherman Anti-Trust Act and in restraint of trade, and the said contract is wholly inoperative, illegal and void.

15. That said contract is illegal and void in that Defendant signed it under the coercive pressure of said illegal agreement and scheme made in restraint of trade, and would not have signed it but for the fact that because of said agreement among said distributors in restraint of trade, he was compelled
54 to do so or go out of business.

III.

Further answering, this defendant alleges that by reason of the matter set forth in Paragraph 7 (a) and (b) above, the said contract was unilateral, and was intended to be unilateral in that the purpose and effect thereof was as follows: That the distributors including the said plaintiff would first advertise in all the trade journals a number of

motion pictures or photoplays as being produced by the respective advertiser and the various features thereof, playing up in each instance the amount of patronage such photoplays would attract; that after such advertisement had been made, the producers would then send out their respective salesmen, who because of and by virtue of such advertisement, advertising a limited number of such photoplays as headliners would sell or license the entire product or a large proportion of such entire product to the exhibitor based solely upon the promise of obtaining the said advertised photoplays. 55 56

That at the time of such advertisement and at the time of entering into such licensing contracts no one knew which photoplays would be popular and which would not; that a photoplay is "road shown" when it proves to be upon exhibition extremely popular and can be shown at prices of $1.00 admission charge and upward.

That after said licensing contract would be made in each instance, the producer and distributor would give a few exhibitions of the motion pictures previously licensed and that if it proved upon such exhibition that the motion pictures previously licensed were so popular and were otherwise capable of being "road shown" they would be by the terms of said contract excluded therefrom; if on the other hand the said pictures upon such exhibition could not be "road shown" but were nevertheless extremely popular, then again by the terms of 57

said contract the distributor would under the pro-
58 visions hereinbefore quoted, refuse to generally release them and they would be excluded from said contract, and said distributor would only show them at such places and upon such terms as he thereafter determined.

That the effect and purpose of such provisions was to make the said contract binding upon the exhibitor, and that the distributor was only bound if and when it proved advantageous to his interest and as he so determined it.

59 IV.

Further answering this Defendant re-alleges and re-affirms the allegations of Paragraph II above mentioned, and alleges that if the said contract is not illegal and void, the plaintiff has failed to arbitrate the said claim set forth in this cause of action, and that before he does so arbitrate the same, he cannot maintain this action under the terms of said contract.

For amended answer to Plaintiff's second cause of action herein, Defendant alleges:

60 I.

Admits Paragraph One of said second cause of action, and denies generally each and every other allegation, matter and thing contained in said second cause of action, save and except as is hereinafter specifically admitted, qualified or avoided.

II.

For a further defense to Plaintiff's second cause

of action, Defendant alleges and re-alleges Paragraphs II, III and IV of the Amended Answer to Plaintiff's first cause of action, by reference, as though the same were herein set forth in full. 61

WHEREFORE, Defendant demands judgment in his favor and against Plaintiff; that it take nothing by this action; and that said action be dismissed, and that he have his costs and disbursements herein.

Dated:

September 9th, 1932.

SAMUEL P. HALPERN,
Attorney for Defendant, 62
310 McKnight Building,
Minneapolis, Minn.

ss.

Duly Verified

REPLY.

For Reply to Amended Answer the plaintiff puts in a general denial of all new matter in the Amended Answer, except the admissions therein.

(Duly Verified.) 63

(Title of Cause.)

STIPULATION.

For the purpose of the trial, argument and decision of the above entitled action now at issue in said court, the following facts are admitted to be true, viz:

1. The facts alleged in paragraphs 1, 2, 3, 4, 6
64 and 7 of the First Cause of Action in the complaint.

2. The facts alleged in paragraph 1 (by reference) and paragraphs 2, 3 and 4 of the Second Cause of Action in the complaint.

3. Excepting, however, from each of the foregoing admissions the allegations where made, that the failure to play or pay for said pictures was *wrongful* or *unlawful.* The defendant claiming that said contracts were illegal in this, that they violated the Sherman Anti-Trust Act of the United
65 States.

4. It is further admitted that the printed portion of each of said contracts sued upon in the complaint is substantially the same as the contract construed in the United States District Court, Southern District of New York in the case entitled, "United States of America, Petitioner, vs. Paramount Famous Lasky Corporation, et al, defendants," by decision rendered October 15, 1929, by T. D. Thatcher, United States District Judge, which case was affirmed by the United States
66 Supreme Court in Vol. 282 U. S. 30—34; 75 L. Ed. 145. It is further admitted that the plaintiff in this action was one of the defendants named in said action and said opinion of the United States District and Supreme Court hereinbefore referred to.

5. It is further admitted that paragraph 18 contained in each of said contracts, and known as the "Arbitration Clause" is the same as the paragraph 18 in the contract construed by said decisions above

named, and said paragraph 18 was held by said decisions to be illegal and unenforceable. 67

Admitted that since said decisions were made, Arbitration under the terms of said paragraph 18 has been discontinued by plaintiff, and all machinery and methods and rules for arbitration of legal rights and disputes of the parties under said contracts, have been abolished by plaintiff and the other Film Companies, defendants in said action, and plaintiff in this case makes no claim, and claims no rights under said paragraph 18 of said contracts.

6. Said contracts may each be introduced in evidence in this case. 68

7. It is admitted, that if plaintiff is entitled to recover under the admissions and terms of this stipulation, that the measure of its damages shall be the principal sum of One Thousand Eight Hundred Fifty-three & 42/100 Dollars, with interest on the constituent sums as claimed in the complaint, and its costs and disbursements of this action to be taxed, less the sum of $15.00 hereby agreed upon as the cost to plaintiff of shipment of the films to defendant. 69

8. It is further admitted that prior to 1926, and at all times since then, the defendant was a member of an unincorporated Association known as the Motion Picture Theatre Owners of the Northwest; that in agreeing to adopt and in the adoption of the said uniform standard contract, W. A. Steffes as president of said Association, represented said Association in serving upon a contract committee with others representing plaintiff and the other

mentioned in paragraph 4 of this stipulation, and
70 further, that it was agreed by said plaintiff and said producers and distributors and said Association of Exhibitors through said representatives that from and after the adoption of the use of said standard form contract all motion picture photoplays should be licensed by the producers and distributors and hired by the exhibitors for exhibition only upon the terms and conditions contained in said form of contract; that thereafter, the said Association ratified said agreement, and that since 1926, the said standard uniform contract with cer-
71 tain modifications agreed to and adopted in like manner from time to time was used exclusively by the said producers and distributors in selling, and by exhibitors including defendant in buying the license to exhibit same until the affirmance of the case mentioned in paragraph 4 of this stipulation by the Supreme Court of the United States.

And that the adoption, ratification and use of said contract as in this paragraph set forth was secured by the means and in the manner set forth in the decision of the United States Supreme Court
72 herein cited.

The foregoing constitutes all the facts in this case.

Dated October 4, 1932.

SHEARER, BYARD & TROGNER,
Attorneys for Plaintiff.

SAMUEL P. HALPERN,
Attorney for Defendant.

EXHIBITS A & B.

73

(As these two exhibits are practically identical as to *printed matter* therein, Counsel have stipulated that the originals shall be sent up to the Supreme Court for the inspection of the justices, and that photostatic copies thereof be furnished to each justice for their convenience.—Therefore these long exhibits are not printed in the record.)

(Title of Cause.)

Before Hon. P. W. Guilford, Judge,
(without a jury.)

74

Appearances

Messrs. Shearer, Byard & Trogner,
Attorneys for Plaintiff.

Mr. Samuel P. Halpern,
Attorney for Defendant.

TRANSCRIPT OF EVIDENCE.

This action came on for trial before the Hon. P. W. Guilford, Judge, at the courthouse, in the city of Minneapolis, Minnesota, on January 30, 1933. Counsel for plaintiff stated the issues to the Court and read the stipulation of facts which is on file in the action.

75

(Plaintiff's Exhibits A and B are marked.)

Mr. Shearer: I offer in evidence Plaintiff's Exhibits A and B.

Mr. Halpern: I have no objection except that we desire to have it known that by stipulating that they may be introduced in evidence we do not admit

their validity or that these contracts are supported
76 by sufficient consideration.

The Court: With that understanding they may be received. Subject to your objections, they will both be received.

(At this time recess was taken until January 31, 1933, at ten a. m.)

January 31, 1933, 10 A. M.

Mr. Shearer: These contracts, Exhibits A and B, are received?

The Court: Yes.

77 Mr. Shearer: That is our case.

The Court: Plaintiff rests?

Mr. Shearer: Yes.

Mr. Halpern: Your Honor, I wish to make a very brief statement and then, perhaps, after a five-minute recess, I will decide whether we deem it necessary to offer any evidence in the case.

(Counsel addressed the Court.)

ALBERT B. MULLER

being duly sworn on his own behalf, testified as
78 follows, examined by Mr. Halpern:

Q. Where do you live?

A. Maple Lake, Minnesota.

Q. Are you the owner of a motion picture theater in that town?

A. I run it, I lease it.

Q. And how long have you operated that theatre?

A. About fourteen years.

Q. Have you attended to the buying of pictures during all of that time? 79

A. Most of the time.

Q. Before 1929—before 1926 did you buy pictures?

A. Yes.

Q. And did you do business with the Fox Film Corporation, the plaintiff in this case?

A. I think so; I am not so sure. Yes, I have.

Q. Have you done business at different times with the Fox Film?

A. Yes. 80

Q. And Warner Brothers?

A. Well, I think they went under a different name.

Q. Vitaphone or Vitagraph?

A. They had different names; they kept changing names of the company.

Mr. Shearer: Won't you speak louder?

A. I couldn't say whether the Warner Brothers were in existence. They kept changing names of the companies.

Q. But you did business with whatever company 81 was represented by Warner Brothers?

A. Yes, sir.

Q. And First National?

A. Yes, sir.

Q. And Famous Players Lasky?

A. Yes, sir.

Q. And Paramount Publix?

A. Yes, sir.

Q. And R. K. O.?

82 A. Yes, sir.

Q. And Pathe?

A. Yes.

Q. And Columbia?

A. Yes.

Q. And United Artists?

A. Yes, sir.

Q. Educational?

A. Yes.

Q. Metro-Goldwyn?

83 A. Yes, sir.

Q. In fact, you did business with all of the principal producers and distributors?

A. Yes.

Q. And they all had offices or agencies located in Minneapolis?

A. Yes.

Q. In addition to those national organizations there are one or two independent concerns?

A. Yes, there are.

Q. And that is also—they are also located in

84 Minneapolis?

A. Yes.

Q. Your theater is served out of the exchanges that are located in Minneapolis, isn't it?

A. Yes.

Q. During all of the time that has been mentioned, have you been a member of an unincorporated association, known as the Motion Picture owners of the Northwest?

A. Yes.

Q. And was Mr. W. A. Steffes the head of that 85
organization?

A. Yes, sir.

Q. As manager and as president?

A. Yes, sir.

Q. And did he represent the membership?

A. Yes.

Mr. Shearer: Just a minute. That is objected to as calling for a conclusion of the witness and incompetent.

Mr. Halpern: Well, that is in line with the 86
stipulation.

Mr. Shearer: Well, if the Court please, this is an unincorporated association——

The Court: Well, if it is not stipulated I think the question is objectionable as calling for a conclusion of the witness.

Mr. Shearer: And for the purpose of the objection may the answer be stricken out?

The Court: I presume the fact should be shown as to what Steffes did for them. Steffes himself can testify if he was an agent. 87

Mr. Halpern: I would have had him here, and we will get him here, if he is still in the city.

The Court: It simply involves a question whether a third person, whether somebody who is a member of an association can say that such and such a person is the agent of the association.

(Counsel thereupon read paragraph "8" of the stipulation.)

The Court: In view of that stipulation I suppose
88 your question would be unnecessary, wouldn't it?

Mr. Shearer: I did not get the ruling, your Honor.

The Court: I said, in view of the stipulation his question would be unnecessary. The stipulation provides that Steffes represented the association.

Mr. Halpern: I will withdraw that question.

The Court: It provides that Steffes represented the association, the stipulation does.

Mr. Shearer: Yes, but, your Honor, the point I
89 make is this: This is an unincorporated association. That means an aggregation of individual units and no person can represent a unit because he represents the association. The association is a name and nothing else.

The Court: He represents all of the units, all of the members, doesn't he?

Mr. Shearer: No, not at all. I have authorities.

The Court: Whom does he represent, then?

Mr. Shearer: Well, he represents this unincorporated association, which is really a name, and he
90 represents only those who ratify or affirm his acts, or take part in it.

The Court: But he represents those who authorized him, doesn't he?

Mr. Shearer: There isn't any authority here, no testimony up to this time, that throws any authority upon this man, Mr. Steffes.

The Court: The question is withdrawn, so the argument is futile.

Mr. Shearer: All right.

Q. Did you attend any of the conventions of the association in 1926, 1927, 1928, and 1929? 91

A. Yes.

The Court: Conventions of what?

Q. Conventions of your local association, that is, the motion picture theater owners of the northwest?

A. Yes, sir.

Q. How many conventions did you have a year?

A. Sometimes we had—most of the time only one, and I think once or twice we had two.

Mr. Shearer: Each year? 92

Witness: One each year and then there was a special meeting called, I think once or twice.

Q. It has been stipulated and agreed that Mr. Steffes, representing your organization, served on a contract committee with three or four representatives of the Motion Picture Producers and Distributors, prior to 1926, and subsequent to 1926, in the formulation of what was finally known as the standard exhibition contract. Did you understand that Mr. Steffes did so represent your organization?

A. He served on that committee, yes. 93

The Court: Contract committee?

Witness: Yes.

A. And after having served on that committee and having arrived at conclusions in regard to the form of the contract to be used in the industry, did he report back to your organization at a meeting of the convention at which you were present what he had done?

Mr. Shearer: Just a moment. May I ask a ques-
94 tion?

The Court: Yes.

Mr. Shearer: Before asking the question,—Mr. Halpern, I suppose that Mr. Steffes kept minutes of what was done and where and when and what. This general verbal testimony of one of an unincorporated association is, it seems to me, if the Court please, incompetent to prove what counsel is attempting to prove, and in pari delicto on the part of his client. It seems to me that, in view of the fact that this was an unincorporated association and
95 under the law it binds only the persons who particularly take part, it seems to me there should be better evidence. I object to this evidence on the ground that it is not the best evidence, it is incompetent and immaterial to prove any issue in this case.

The Court: Were there minutes kept which contain the fact that you are trying to prove by this witness, do you know?

Mr. Halpern: I don't know, your Honor, if it contained all the records. Maybe the witness
96 knows.

The Court: Let's find out from him.

Q. Do you know whether or not there was a record made or minutes made by some recorder of what transpired at the meeting of your organization at the different conventions?

A. They have a record, but how much is covered I couldn't say.

Q. They have some record but you don't know what is in that record?

A. No, I don't.

97

The Court: Who kept it?

Witness: They had a stenographer that takes care of it, took care of all their work, and the records were kept at the office. I don't know who kept those records.

Q. You mean there was a secretary to Mr. Steffes or to the organization?

A. There was a secretary to the organization.

Mr. Shearer: The secretary was at each meeting?

Witness: Yes.

98

Mr. Shearer: And took notes?

Witness: Well, they had a shorthand writer there, took all the notes.

Q. Did you attend any meeting of your organization at which the question came up upon the ratification of the use of what is known as the standard exhibition contract, generally in the industry; were you present at any such meeting?

A. Yes.

Q. What was the year?

A. I couldn't recollect just which year it is.

99

Q. Was it before 1929?

A. Yes, sir.

Q. Was it after 1926?

A. I think it was.

Q. It was between 1926 and 1929?

A. Yes, sir.

Q. And then did you vote upon that proposal?

A. Yes.

Q. Or question?

100 A. Yes.

Q. And was there a vote taken by all?

Mr. Shearer: Wait a moment. If the Court please, I think this is too indefinite; 1926 to 1929 is three years. It is a matter of common knowledge in the film business, and I think counsel knows it, that these contracts were started some time in 1926 and they were amended from time to time up until I think, May, 1928, quite a number of changes made in them. I don't think we get anywhere by giving this sort of indefinite testimony. We ought to be

101 exact about it because the purpose here is to throw overboard an important contract and, perhaps, thousands of others. We ought not to have this sort of indefiniteness.

The Court: If the contract varied from time to time, of course, it would be necessary to show that the contract which is before the Court here to-day is the same contract that was acted upon at the meeting you are talking about. If it were a different contract it would not be of any help to us.

Q. I will ask you to state whether it is not a fact

102 that there were changes and amendments made from time to time in the formulation of the standard form contract?

A. No, there was not,—as far as I know there was not.

Q. As far as you know, there was not. Well, you are acquainted with the standard form contract that was finally adopted for general use?

A. Yes.

Q. I will ask you now whether you were present at the meeting of your association prior to 1929 at which a vote was taken on the question of the ratification of the use of this last prepared or standard form contract? 103

Mr. Shearer: That is objected to as not the best evidence and as incompetent and immaterial.

The Court: Does it appear definitely that the association had a regular record of its proceedings kept by a secretary? He said there was a stenographer there that took it down. That does not mean anything. There may have been a half a dozen stenographers there; but was there a regular person charged by the association, whose duty it was to keep a record of the association meetings, like the minutes of a corporation? 104

BY MR. SHEARER:

Q. Let me ask a question or two, perhaps this witness knows. You said there was a stenographer present at each one of those meetings?

A. Yes, sir.

Q. Whose stenographer was that, Mr. Steffes's?

A. Belonged to the association. 105

Q. What?

A. The association.

Q. This association of which you were a member?

A. Yes, sir.

Q. It was their stenographer?

A. Yes, sir.

Q. They kept a record of each one of those meetings?

A. Yes, sir, supposed to.

106 Q. Of the motions made?

A. Yes, sir.

Q. And what was done at the meeting?

A. Yes, sir.

Q. And that stenographer was at each one of the meetings that you attended?

A. Yes.

Q. And you understood that that stenographer was taking a record for the purpose of the association?

107 A. Yes.

Q. Of which you were a member?

A. Yes, sir.

Q. Of a record of the proceedings of the business that took place at the meetings?

A. Yes, sir.

The Court: Was it transcribed into longhand then, or just left in her notes, do you know?

Q. Do you know whether they were transcribed?

A. Everything that was taken up there was adopted, and, of course, she entered it into her notes

108 after it was adopted.

The Court: Was it transcribed into longhand, do you know?

The Witness: Not at that time, I don't think.

The Court: Was it afterwards transcribed into longhand by her?

Witness: I couldn't say, but it was supposed to be.

The Court: You don't know. Did you ever see

the longhand record of the association meetings?

Witness: The only thing I seen is what they 109
mailed out to us.

The Court: What did they mail out to you, then?

Witness: They mailed out certain letters in regard to certain things that were done.

The Court: Did they send you a copy of the record of what was done?

Witness: A partial copy of it.

Q. You attended more than one of those meetings?

A. Yes, sir.

110

Q. At the second meeting that you attended did the secretary of Mr. Steffes read a report of the proceedings that took place at the first meeting?

A. I couldn't say.

Q. You can't remember about that?

A. I couldn't say whether it was or not.

Q. At any one of those meetings that you attended, did Mr. Steffes or the secretary read a report of the proceedings of the previous meeting?

A. No, I don't think so; I am not so sure.

Q. When you men got out, we will say, to the 111
second meeting where Mr. Steffes presided, at the second meeting that you attended, didn't somebody read to the people there assembled what had taken place at the first meeting, so that you all knew what Steffes had done in the meantime?

A. It might have been done, but I got there a little bit late.

Q. You came from out of town?

A. Yes, sir.

112 Q. Where were the meetings held?

A. They were held at the Radisson hotel and at the Nicollet.

Q. All in Minneapolis?

A. Yes, sir.

Q. Can you remember on any one of those occasions whether you were there at the opening of the meeting when the secretary, as is usual, reads the proceedings that took place at the prior meeting?

A. I can't testify to that, because I am not sure.

Mr. Halpern: The present secretary of the asso-
113 ciation tells me, your Honor, that Mr. Steffes is out of the city and won't be back until to-morrow. He has been away for about a week. She is looking up the records of the association, and whatever such records disclose is going to be made available to the Court. That is, the records can be produced.

The Court: Will she bring them down here, do I understand?

Mr. Halpern: She will bring them down whenever we ask her to.

The Court: You will want them now, if you get
114 them at all.

Mr. Halpern: She is looking through them and I said I would call her back in fifteen minutes. I think I can let that go at this time and proceed with the other.

BY MR. HALPERN.

Q. I will ask you this question, Were you present at a meeting of your association at which a vote was

taken upon the use of the standard form contract, known as Plaintiff's Exhibit A? 115

A. Yes.

Q. Now, Mr. Muller, being in the business, as you have been, for about fourteen years, can you tell us whether or not you could operate your business there, your theater, without the purchase or leasing from at *least some of the film companies* that I have mentioned?

A. No, I could not.

Q. That is, the independent producers that are not members of the Film Board of Trade do not produce enough pictures for any one theater? 116

A. No.

The Court: You say you could not operate your theater without getting pictures from whom?

Mr. Halpern: From at least some of the film companies that I enumerated.

Q. Since the spring of 1928 and up until some time in 1930, could you buy or lease from any of such companies, including this plaintiff, any motion picture for use at your theater upon any form contract other than what was known as the standard exhibition contract, or Plaintiff's Exhibit A? 117

A. No.

Q. Were any other types or forms of contracts used by any of the producers and distributors that I mentioned in that period of time?

A. No.

The Court: What period of time?

Mr. Halpern: Between the spring of 1928 and about June, 1930.

The Court: Are they still using that form?

118 Mr. Halpern: No, they are not.

The Court: Do I understand that since this decision of the Supreme Court of the United States they have adopted a new form of contract or have no form at all, or what is it?

Mr. Halpern: They have not, at least as far as I know, acted in concert with the use of any particular contract. They use a large portion of the same provisions but they wiped out some of the provisions.

Q. Were you present at a meeting of your asso-
119 ciation which ratified the use of Exhibit A?

Mr. Shearer: That is objected to as not the best evidence and as incompetent and immaterial.

Mr. Halpern: The stipulation provides that thereafter said association ratified said agreement, in paragraph "8."

Mr. Shearer: Well, the association,—whatever that means.

Mr. Halpern: And I asked him if he was present when a vote was taken and he testified he was present, and I asked if he was present when the con-
120 tract was ratified.

The Court: In view of that stipulation the objection is overruled.

Mr. Shearer: Note an exception.

A. Yes.

Mr. Shearer: I would like you to fix that date.

Q. Do you remember approximately when that was?

A. I couldn't say just what year it was in.

Mr. Halpern: I think that is all. 121

CROSS-EXAMINATION.

BY MR. SHEARER:

Q. Mr. Muller, have you any other business than that of the motion-picture business?

A. Yes.

Q. What business?

A. Furniture and undertaking.

Q. Do you conduct that at Maple Lake?

A. Yes, sir.

Q. Have you any other business there that you 122
are interested in?

A. I do some plumbing business.

Q. At Maple Lake?

A. Yes, sir.

Q. Any other business?

A. That is about all. I was in some, but I am not now.

Q. Have you a manager for your theater?

A. I have a kind of a man that looks after same.

Q. What is his name?

A. Eddie McAlpine. 123

Q. How long has he been manager?

BY THE COURT:

Q. Is he manager?

A. Well, he is not in any particular way but just takes care of my work.

Q. What does he do?

A. Oh, he does the booking; I do all the buying myself.

Q. He does the booking, what do you mean?

124 A. He selects the pictures when they are to be played.

Q. He selects what the pictures are to be and when they are to be delivered, is that it?

A. He don't select the picture when we buy it but he selects the pictures when we play them and plays them.

Q. That is, he selects the time when the pictures shall be shown, is that it?

A. Yes, sir.

125 Q. What else does he do?

A. He takes care of the advertising.

BY MR. SHEARER:

Q. He contracts for all of your pictures?

A. No.

Q. Doesn't he conduct most all of the correspondence with the branch office?

A. He does, with my instructions.

Q. Doesn't he come to the branch office in negotiating your pictures?

126 A. He doesn't sign any contracts whatever.

Q. No; you sign the contracts?

A. Yes.

Q. You sign the contracts, but, as a matter of fact, most of the negotiating is done by Mr. McAlpine?

A. No, it is not.

Q. Can you show me a letter that you personally have signed in reference to any of these pictures in

this case that you wrote to the plaintiff, in connection with any of these pictures? 127

A. I can't say that, but I directed whatever was written.

Q. I am showing you a letter, dated May 13, 1930, written upon your letterhead, "A. B. Muller, Furniture and Undertaking".

A. Yes.

Q. Directed to J. H. Lorentz, Fox Film Corporation, Minneapolis, Minnesota, addressing him as "Dear Jack", and signed by whom?

A. McAlpine. 128

Q. Whom is it signed by?

A. Eddie McAlpine.

Q. You read it. That was written, wasn't it, by Mr. McAlpine?

A. Yes, sir.

Q. On behalf of your business?

A. Well, it has reference to some of it.

Q. And for your theater?

A. It has reference to some of it.

Q. Isn't it a fact that practically all of the correspondence in connection with the theater business, booking of pictures, and so on, was conducted by Mr. McAlpine? 129

A. He done all the booking.

Q. And negotiating, under your direction?

A. Under my direction, yes.

Q. And he was the one that represented your theater in dealing with the corporation direct, the Fox Film?

A. Not as far as negotiating contracts; I done
130 that myself.

Q. No; you signed those yourself, but I mean the correspondence.

A. He took care of the correspondence.

Q. I show you another letter, which is dated January 26, 1932, written on your letterhead and signed by Ed A. McAlpine, written to N. F. Hill, Fox Film Corporation. That is a letter reference to some of these matters, isn't it?

A. I suppose it is; I did not read it.

131 Q. That is in reference to a superseding contract?

A. This letter was in regard to trying to make a settlement with them. I told them to see what we could do in regard to it.

The Court: You told McAlpine?

Witness: Yes.

Q. Isn't it a fact, Mr. Muller, that you also have business outside of Maple Lake that keeps you pretty busy?

A. No; I do all my business there at Maple Lake.

Q. I know, but you are engaged in other busi-
132 nesses outside of Maple Lake, are you not?

A. Well, in the country around.

Q. The furniture and undertaking business keeps you pretty busy?

A. Yes, they do. They have not for the last couple of years, but—

Q. Who attends to the box office of the theater?

A. My wife.

THE COURT:

133

Q. She sells the tickets, does she?

A. Most of the time she sells the tickets.

Q. How often does your theater run?

A. We make two changes a week.

Q. That is, you run every day?

A. No, we do not.

Q. How often do you run?

A. Well, we run, sometimes run four days and sometimes five. It all depends on—we usually make two changes; that is, we have two different pictures we run.

134

Q. Just evenings?

A. Yes, sir, we just run evenings; lately we have been running matinee on Sundays, just one show.

BY MR. SHEARER:

Q. Is McAlpine interested with you in the business?

A. No.

Q. Has he any interest in the receipts?

A. No.

135

Q. You hire him so much a month?

A. He just works there and stays part of the time with me.

Q. You pay him a salary?

A. No, I do not.

Q. You do not pay him anything?

A. No.

The Court: Does he do this work for nothing, for you?

Witness: Well, he does it. He stays there with
136 us and we kind of live together; he is my nephew.

The Court: He does it for his board and lodging?

Witness: He does it for his board and lodging. I give him a little, off and on, but there is no set salary.

Q. Is he related to you by marriage?

A. Yes, sir, he is related to me.

Q. Married to your daughter?

A. No, he is my nephew.

Q. Has he any other business than this?

137 A. No, he has not. He is a graduate from the school here.

Q. Isn't it a fact that Mr. McAlpine attended some of these meetings of the motion picture theater owners of the northwest?

A. I couldn't say. He might have attended one or two; I wouldn't say; part of the time, when they allowed outsiders in there.

Q. If he attended those meetings you both did not attend, did you?

A. Yes.

138 Q. Both of you?

A. Yes.

Q. What became of your business while you were in attendance?

A. There wasn't any business then.

Q. Can you give any dates when these meetings took place?

A. You mean, the conventions?

Q. Yes.

A. I can't give the exact dates.

139

Q. Was there more than one a year?

A. Well, there was once or twice where they called a special meeting; otherwise there was only one meeting a year.

Q. And usually when did that take place?

A. They had one during fair week, they had a special meeting, and they had the others in the early part of the season; that is, in the spring of the year or late winter.

The Court: Did you have an operator to show the pictures, or who does that work?

140

Witness: My son does the operating.

Q. Your son operates the theater?

A. He operates the machines.

Q. The projection machines?

A. Yes, sir.

Q. Did you make any memoranda of what took place at any of the meetings that you attended?

A. I did not.

Q. Were there many or few in attendance?

A. There was quite a few.

141

Q. How many would you say?

A. I couldn't say, offhand. Some of the meetings there was maybe around 100 or 150.

Q. Were there any of the meetings that you did not attend?

A. The only meetings I did not attend was in the last year.

Q. What is that?

A. This last year I did not attend any of the meetings.

Q. That was 1932. Were there any meetings in
142 1930 that you did not attend?

A. I think I attended them all.

Q. In 1929?

A. Yes.

Q. You are a pretty busy man, aren't you?

A. Not so awful busy. I got business, but I can always take off time for that. I was subject to call whenever I did come down. If they wanted me I was supposed to be called back.

Q. Were you ever called back to Maple Lake
143 before the meetings was over?

A. No.

Q. How long did the meeting last?

A. Some lasted two days.

Q. Sometimes two days?

A. Two days.

Q. Ever any more?

A. There might have been one or two that lasted three days; I am not so sure of that.

Q. Did any of them last less than a day?

A. They lasted a day.

144 Q. Less than a day?

A. No.

Q. Some of them did last only one day?

A. Yes, the last meeting I was at lasted a day.

Q. There were other matters taken up at those meetings, of general interest to the motion picture exhibitors?

A. At one meeting, yes, there was—

Q. I don't mean you to specify, but simply whether there were. 145

A. Yes, there was.

Mr. Halpern: The secretary is still looking through her records. Her whole testimony will take ten minutes, and when she finds the record of that particular meeting we will have it produced here. In view of the fact that this is not a jury trial we should be permitted to offer that evidence when she gets it. Outside of that testimony we have no further testimony in the case, your Honor.

The Court: Have you any rebuttal? 146

Mr. Shearer: No.

(Title of Cause.)

STIPULATION.

It is hereby stipulated, by and between the parties hereto, that the foregoing proposed case, consisting of 22 pages of typewritten matter, containing all the evidence offered or introduced on the trial of said cause, and also all objections, rulings, orders, motions, and all other proceedings had upon said trial, together with Exhibits A and B, shall constitute the settled case in said action and may be settled and allowed by the court without further notice. 147

Dated, Minneapolis, Minn., Oct. 7, 1933.

SHEARER, BYARD & TROGNER,
Attorneys for Plaintiff.

S. P. HALPERN,
Attorney for Defendant.

CERTIFICATE.

148 I hereby certify that the foregoing proposed case, consisting of 22 typewritten pages, contains all the evidence offered and received at the trial of said cause, and also all objections, rulings, orders, motions, and all other proceedings had upon said trial, together with Exhibits A and B, and I hereby settle and allow the same as the settled case herein.

Dated, Minneapolis, Minn., Oct. 14, 1933.

P. W. GUILFORD,
Judge.

149

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

The above entitled action, having duly come on to be tried before the undersigned, one of the Judges of the District Court of Hennepin County, Minnesota, on the *30th* day of *January, 1933,* plaintiff appearing by attorneys Shearer, Byard and Trogner and J. D. Shearer, and the defendant appearing by attorney Samuel P. Halpern; and whereupon the Court proceeded to hear the evidence in said matter,
150 and the Court having heard the evidence and examined the pleadings, papers and files in said cause, and having duly considered the matter, and being fully advised therein, makes the following:

FINDINGS OF FACT:

I.

That Plaintiff is a corporation, authorized to do business in the State of Minnesota; that the defend-

ant was at all times herein mentioned the owner and operator of the Rex Theatre, in the City or Town 151
of Maple Lake, Wright County, State of Minnesota, and was at all times herein mentioned engaged in the business of exhibiting sound motion pictures.

II.

That on or about the 6th day of September, 1929, plaintiff and defendant entered into a written contract; that said contract is known as the Standard Exhibition Contract, and that said contract provided for the granting of a license by plaintiff to defendant to exhibit forty-one (41) photoplays listed therein, 152
at the defendant's said theatre, in the City of Maple Lake, State of Minnesota. That under and by virtue of the terms of said contract, defendant undertook and agreed to pay as aggregate rental for said license to exhibit said pictures the sum of Eighteen Hundred Five and no/100 ($1,805.00) Dollars that defendant failed to exhibit and pay for said forty-one (41) photoplays.

III.

That on or about the 6th day of September, 1929, 153
plaintiff and defendant entered into a written contract, and said contract is known as the Standard Exhibition Contract, and that said contract provided for the granting of a license by plaintiff to the defendant to exhibit four (4) photoplays therein listed at the defendant's said theatre, in the City of Maple Lake, Minnesota; that under and by virtue of the terms of said contract, defendant undertook

and agreed to pay as aggregate rental for the said
154 license to exhibit said pictures the sum of Forty ($40.00) Dollars.

IV.

That at and for a long time prior to the making of said contract, plaintiff was a distributor of motion pictures, distributing said pictures for shipment and sale and commerce between the several states of the United States, and that at all of said times, the defendant was and still is an exhibitor of motion pictures distributed by plaintiff and other producers
155 and distributors of motion pictures in the United States.

V.

That prior to the making of said contract, as well as at the time of entering into same, said plaintiff, together with other producers and distributors of motion pictures, were members of said Motion Picture Producers and Distributors of America, and controlled 60% of the production and distribution of motion pictures in the United States produced and distributed for shipment and sale and com-
156 merce between the several states, and that all of said times, the said members of said Motion Picture Producers and Distributors of America, including Plaintiff, together with other producers and distributors of motion pictures, being all members of the several Film Boards of Trade, organized and controlled by the said members of the Motion Picture Producers and Distributors of America, including this plaintiff, controlled at least 98% of the pro-

duction and distribution of motion pictures in the United States, produced and distributed for shipment and sale and commerce between the several States. 157

VI.

That at all times herein mentioned, all exhibitors, including the defendant, engaged in exhibiting such motion pictures in theatres throughout the United States, were of necessity compelled to do business with said plaintiff, and said other producers and distributors controlling the production and distribution of said motion pictures in order to obtain motion pictures to carry on their business. 158

VII.

That in the year 1928, the plaintiff herein and said other producers and distributors of motion pictures so controlling 98% of the production and distribution of motion pictures for distribution and commerce between the several states, did agree with each other and with some exhibitors, including this defendant, through their duly authorized representatives, that they would distribute their product and motion pictures throughout the United States in a particular manner, to-wit, by means of the said standard exhibition contract and none other, and that no one would be permitted to sell, license or purchase or exhibit any motion pictures so produced and distributed within the United States, except under said plan and in conformity with the terms of said contract. 159

VIII.

160 That pursuant to said agreement among said producers and distributors, including plaintiff, it was then agreed by and among said producers and distributors, including plaintiff, that the terms upon which any of said distributors would sell, and any exhibitors, including defendant, would be permitted to purchase from said distributors, should be embodied in a form of contract known as the Standard Exhibition Contract; that none of the said distributors would sell or permit the exhibition of their product in the United States, except under the
161 terms of said Standard Exhibition Contract, to be executed by the particular distributor and exhibitor in each instance; that the distributor and exhibitor were each required to warrant that the said predetermined terms were all contained in such contract, and that no provision inconsistent with such predetermined terms was contained therein.

IX.

162 That after and pursuant to such previous agreement had between said distributors and exhibitors, including plaintiff and defendant, plaintiff and defendant entered into and executed the contracts declared on in plaintiff's complaint for the distribution and exhibition of the motion pictures or photoplays mentioned therein upon the terms so predetermined and agreed upon.

X.

That said contracts provide for the payment of stipulated rentals by the defendant for the exhibition of each of said motion pictures, and that the defendant refused to exhibit, or pay said rentals. 163

XI.

That said standard form contract contains among other provisions, a compulsory arbitration clause, providing for penalties to be imposed upon the defendant in the event that he refuses to arbitrate or refuses to abide by the award rendered in such arbitration proceedings, and further provided for joint summary action on the part of all the producers and distributors, including plaintiff, against the defendant, for the purpose of enforcing the said compulsory arbitration clause contained therein. 164

XII.

That said arbitration clause was declared illegal and in violation of the Federal Sherman Anti-Trust Act by the United States Supreme Court in the case of Paramount Famous Lasky Corporation, et al, vs. United States. 165

XIII.

That the provisions in said contracts with regard to arbitration are not divisible covenants, but form an essential part of the consideration for the making of said contracts, and that without such arbitration clause, it is doubtful if said contracts would have been made; that the said illegal arbitration provi-

sions the said contracts contain, rendered the en-
166 tire contracts illegal and void.

XIV.

That the parties stipulated that in the event the plaintiff was entitled to recover the damages are the sum of $1,853.42 less the sum of $15.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW.

167

I.

That each and all of the contracts set out in plaintiff's complaint are null and void and illegal, and in violation of the Sherman Anti-Trust Act; that plaintiff is not entitled to recover the amounts demanded in the complaint, or any part thereof.

II.

That the defendant is entitled to have said causes of action dismissed, and entitled to judgment for
168 costs and disbursements herein against the plaintiff.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

P. W. GUILFORD,
Judge.

Dated:

April 7, 1933. Stay of 30 days.

MEMO.

I. 169

The parent case which has caused all the resulting litigation, with its diversity of opinion is the case of United States v. Paramount-Famous-Lasky Corporation, 34 Fed. (2nd), 984. The decision in this case, written by Judge Thatcher of the United States District Court, Southern District of New York, was affirmed in Paramount v. United States, 282 U. S., 30. By these decisions the agreement between distributors and exhibitors of motion pictures, as contained in Paragraph 18 of the standard contract in reference to arbitration of disputes, was held to be void as in restraint of trade in violation of the Sherman Anti-Trust Law, and the defendant distributors were enjoined from enforcing or entering into any new agreement to enforce said Paragraph 18. 170

The decree contains, in Paragraph 3, the following:

> "III. Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree." 171

II.

At the time of the decree many thousands of these contracts were outstanding in the United States, the exhibitors in some cases having refused to take pictures thereunder or, if taken, having refused to pay

for same. Actions have been commenced in many
172 different jurisdictions on the contracts, either for breach of contract or on contract for pictures actually received. In very rapid succession a number of conflicting decisions have come down in many different Federal and state courts. Some of the decisions are on demurrers.

The more important decisions in favor of the distributors, in the order of their rendition, are as follows:

Columbia Pictures Corporation v. Bi-Metallic Investment Company, United States District Court,
173 Colorado, August, 1930, 42 Fed. (2nd), 873. In this case the holding was for the plaintiff on a demurrer.

Fox Film Corporation v. Buchanan, Court of Appeals of Louisiana, July, 1931, 136 So., 197. In this case there is a full discussion of the matter and a review of previous decisions.

Paramount v. National Theater Corporation, United States Circuit Court of Appeals, Fourth Circuit, April, 1931, 49 Fed. (2nd), 64.

Fox Film Corporation v. Ogden Theater, Su-
174 preme Court of Utah, December 29, 1932, 17 Pac. (2nd), 294.

Metro v. Cocke, 56 S. W., 489, Court of Civil Appeals, Texas, January 18, 1933.

Decisions for defendant in the order of their rendition are as follows:

Majestic Theater Company v. United Artists, District Court of the United States, Connecticut, 43 Fed. (2nd), 991, October, 1930. This was an action

for damages by the exhibitor, suffered as a result of the enforcement of the arbitration provision of Paragraph 18. Plaintiff in this case relied entirely upon the offending paragraph in restraint of trade for relief. It is a concrete illustration of the actual working out of the arbitration contract and justification for the holding of Judge Thatcher. 175

Vitagraph v. Theater Realty Company, United District Court, Pennsylvania, 50 Fed., (2nd), 907, April 1931. This case was decided on a demurrer. The discussion is very brief and unsatisfactory upon the main question.

176

Fox Film v. Tri-State Theater, Idaho Supreme Court, 6 Pac. (2nd), 135, December, 1931. This is an excellent discussion of the subject from the standpoint of the defendant and holds that the illegal parts of the contract are inseparable from the legal parts, and cases are reviewed. It is also held that a contract within the provisions of the Sherman Anti-Trust law, in whole or in part, is illegal and its execution is unlawful; but that there may be a recovery upon quantum meruit where pictures are actually delivered.

177

Fox Film v. Amusement Company, United States District Court of Ohio, 58 Fed. (2nd), 337, March, 28, 1932. It is held in this case that the illegal elements were wholly inseparable from the standard motion picture contract and that the entire contract is tainted.

United Artists v. Piller, 244 N. W., 20, North Dakota, June, 1932. The question of the separation of

the illegal from the legal parts is not discussed, but
178 it is held to be an action on a contract which was in violation of the Sherman Anti-Trust law, and therefor the contract is illegal.

The Utah decision in favor of the plaintiff perhaps states the law most cogently, while for the defendant, the Idaho decision is most persuasive. These decisions turned largely upon the question as to whether the arbitration clause is severable from the rest of the contract. In the Utah case many authorities are cited holding that the arbitration provision was severable and also that provisions in re-
179 straint of trade are generally held to be severable from the body of the contract and no bar to the enforcement of the remaining provisions. I have no doubt that the decisions quoted in the Utah case correctly state the law as to the severability both of arbitration agreements and of provisions in restraint of trade from the remainder of the contract, but in my judgment they are not applicable to the present situation.

In the first place, it is doubtful whether Paragraph 18 is severable. It is not the only offending
180 paragraph in the contract. The seventh paragraph in the last subdivision thereof calls for arbitration as provided for in Paragraph 18 thereof. The twenty-first paragraph also calls for arbitration but it does not clearly appear whether the arbitration is in accordance with Paragraph 18 or not. It thus appears that something more than merely striking out Paragraph 18 is necessary to relieve the contract of all of its offending provisions.

In this case we have, in addition to the common law rules as to severability of contracts, the express provisions of the Sherman Anti-Trust law and the interpretation thereof by several decisions of the Supreme Court of the United States. Section 1 of the Sherman Anti-Trust law declares that every contract in restraint of trade, etc., is illegal and every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor. 181

As to the effect of contracts made in violation of this law the United States Supreme Court has spoken in a number of cases, notably the case of Continental Wall Paper Company v. Louis Voight & Sons Company, 212 U. S., 227. In the latter case the court distinguishes it from the facts in the case of Connelly v. Union Sewer Pipe Company, 184 U. S., 540. In the Connelly case the purchaser was not a party to an illegal transaction. He was merely a person who bought goods at an agreed price and nothing more. It was held that such purchase of goods from an illegal combination was not illegal and was wholly collateral to and independent of the combination in restraint of trade. 182 183

But in the Continental case it appeared that the purchaser was a party to the contract and it was made with a direct reference to and in execution of the illegal agreement. The court concludes that relief cannot be granted the plaintiff without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid in any way to a

party seeking to realize the fruits of an agreement
184 that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay.

In the case at bar it appears from the evidence that the defendant was represented in the conference between the distributors and exhibitors in the formation of the contract and was present at some of the meetings.

It is claimed, however, by plaintiff that language contained in the decree of the Federal District Court
185 of New York contains a severing clause which indicates the intention of the court that the injunction should not be construed as preventing the distributor from enforcing the contract, insofar as such enforcement is consistent with the decree. This severing clause, so-called, would be clearer if after the words "contractual obligation" there appeared the words "theretofore made." But if such were the intention of the Federal District Court it does not appear from the decision of the Supreme Court of the United States affirming that decision that the latter court
186 intended to depart from its well settled rules as to the effect of a violation of the anti-trust law on contracts, as declared in the Continental Wall Paper and other cases. Before we can conclude that the effect of the decision was such as plaintiff claims it ought to be very clear. In the Idaho case the court, after reviewing the opinions of both the trial and the Supreme court, concludes that the Supreme court, at least, intended to hold void the entire contract.

I have, therefore, come to the same conclusion as is expressed in the concluding paragraphs of the Idaho and North Dakota decisions, to-wit: 187

> "A contract which is within the prohibition of the Sherman Anti-Trust law in whole or in part is not only illegal but its execution is unlawful."

Attention is called to a note in the Yale Law Journal, January, 1933, Volume 42, No. 3, in which the cases are reviewed. The author gives as one of the reasons for concluding that the contract is not severable the reason that the arbitration clause is of the essence of the contract, in that it provides the machinery for regulation of relations between the distributor and exhibitor; that since the avowed purpose of the entire contract and arbitration agreement is to establish the sphere of self-government for the industry, it seems beyond doubt that the arbitration clause is vital and of the essence of the contract. 188

I have therefore concluded plaintiff is not entitled to recover in an action on the contract. Possibly where films have been delivered an action may lie in quantum meruit. 189

P. W. GUILFORD,
Judge.

After the foregoing decision was filed, the plaintiff's counsel moved for amended and additional findings of fact and conclusions of law. The motion was heard June 17th, 1933.

On June, 19th, the Court made and filed the fol-

lowing amended and additional findings—which
190 with findings IV to XIV, inclusive, as originally drawn (ante) constitute the findings in the case.

AMENDED FINDINGS OF FACT.

The above entitled cause, coming on to be heard before this Court, on the 17th day of June, 1933, on motion of Shearer, Byard & Trogner, attorneys for the plaintiff herein, for the allowance of Amended and Additional Findings of Fact, and plaintiff being represented by James D. Shearer of Shearer, Byard
191 & Trogner, and defendant being represented by Samuel P. Halpern, and the Court having heard the arguments of counsel, and being fully advised in the premises, hereby amends the Findings of Fact made and filed herein on April 7th, 1933, as follows:

I—Amended to read.

That plaintiff is a corporation authorized to do business in the State of Minnesota and at all times in the complaint mentioned, was the owner and/or distributor under copyrights of the moving picture
192 films and photoplays therein mentioned and authorized to license the same to exhibitors for production at their theatres. That at all times mentioned in the complaint, the defendant was the owner and operator of the Rex Theatre in the City or Town of Maple Lake, Wright County, State of Minnesota, and was at all times mentioned in the complaint, engaged in the business of exhibiting sound motion picture photoplays.

II—Amended to read.

That on or about the 6th day of September, 1929, 193
plaintiff and defendant entered into a written agreement, plaintiff's Exhibit A, dated on that day, wherein and whereby the plaintiff granted to the defendant a limited license under Copyright to Exhibit at defendant's theatre in Maple Lake, Minnesota, the forty-two (42) pictures named in the complaint, which were sound pictures, and in consideration of said contract and the license to exhibit said pictures as therein provided, the defendant promised and agreed to exhibit each of said pictures at his 194
said theatre at the times and for the number of consecutive days as provided in said contract, and to pay the plaintiff therefor the respective sums set opposite said pictures as guaranteed film rental and score charge for the exhibition of said pictures under said contract.

Additional Finding 2½.

That plaintiff in accordance with the terms and conditions of said contract, made each of said pictures therein named available for defendant's use and notified him thereof in writing, and tendered 195
each of said motion pictures to the defendant for exhibition in his said theatre; but that the defendant at all times refused to accept or exhibit said pictures or any thereof, or to pay the said sums provided in said contract, therefor respectively, or any part thereof. That plaintiff has kept and performed each and all of the terms and conditions in said contract contained on its part to be kept and performed, and

has been ready and willing at all times so to do, but
196 defendant has failed, neglected and refused to perform his part of said contract.

Additional Finding 2¾.

It is further found that pursuant to availability notices given to defendant, and at his request, plaintiff shipped by express to the defendant for exhibition by defendant as his said theatre under said contract the following pictures, to-wit Four Devils, The Man from Havana and Married in Hollywood; but defendant failed and refused to receive or exhibit
197 either of said pictures and they were returned to the plaintiff at an expense for carriage charges necessarily paid by plaintiff in the sum of Six and 88/10 ($6.88).

III—Amended to read.

That on or about the 6th day of September, 1929, plaintiff and defendant entered into a written agreement, plaintiff's Exhibit B, dated on that day, wherein and whereby plaintiff granted to the defendant, a limited license under Copyright to exhibit at defendant's said theatre, in the City or Town of Maple
198 Lake, Wright County, Minnesota, the four pictures named in said contract, at the times and under the terms and conditions in said contract specified.

That in consideration of said contract and the license to exhibit said pictures as therein provided, the defendant promised and agreed to exhibit each of said pictures at his said theatre at the times and for the number of consecutive days as provided in said contract and to pay the plaintiff therefor the

sums set opposite said respective pictures as guaranteed film rental. 199

Additional Finding 3½.

That plaintiff in accordance with the terms and conditions of said contract, made each of said pictures available for defendant's use and notified him thereof in writing, and tendered each of said motion pictures to the defendant for exhibition in his said theatre; but that the defendant refused to accept or exhibit the same or any thereof, or to pay the said sum provided in said contract therefor respectively, or any part thereof. That plaintiff has kept and 200 performed each and all of the terms and conditions in said contract contained on its part to be kept and performed, and has been ready and willing at all times so to do, but defendant has failed, neglected and refused to perform his part of said contract.

Additional Finding 3¾.

That pursuant to availability notices given by defendant, and at his request plaintiff shipped by express one of said pictures mentioned in said contract, to defendant for exhibition at his said theatre; but defendant failed and refused to receive or ex- 201 hibit said picture and it was returned to plaintiff at an expense necessarily paid by plaintiff for carriage charges thereon in the sum of Two and 04/100 ($2.04) Dollars.

Findings Numbers IV to XIV inclusive remain as originally drawn. See original Findings ante.

The Court thereupon added Findings XV, XVI, XVII and XVIII as follows:

XV.

202 It is further found that the printed portion of each of said contracts sued upon in the complaint, is substantially the same as the contract construed in the United States District Court, Southern District of New York, in the case entitled "United States of America, petitioner, against Paramount Famous Lasky Corporation, et al, defendant," by decision rendered October 15, 1929, by T. D. Thatcher, United States District Judge, which case was affirmed by the United States Supreme Court in volume 282, U. S. page 30-34; 75 L. Ed. 145. The plain-
203 tiff in this action was one of the defendants named in said action and in the opinion of the United States District and Supreme Court as above referred to.

XVI.

It is further found that paragraph 18 contained in each of the contracts introduced in evidence in this case and known as the arbitration clause, is the same as the paragraph 18 in the contract construed by the courts in the decisions above referred to, and the
204 said paragraph 18 was held by said decisions to be illegal and unenforceable.

XVII.

It is further found that since the decision by the Supreme Court of the United States in the case above referred to, that all machinery and methods and rules for arbitration of legal rights and disputes of the parties under said Standard Exhibition form

of contract have been abolished by the plaintiff and all the other film companies who were defendants in said action. 205

It is further found that the plaintiff in this action makes no claim, and claims no rights under said paragraph 18 in either of said contracts.

XVIII.

It is further found that prior to 1926 and at all times since then, the defendant was a member of an unincorporated association known as the motion picture theatre owners of the Northwest. That in agreeing to adopt, and in the adoption of the said uniform Standard Contract, one W. A. Steffes, as president of said Association, represented said Association in serving upon a contract committee with others representing plaintiff and other producers and distributors referred to in the decision affirmed by the Supreme Court of the United States and generally known as the Paramount case, and that it was agreed by plaintiff and said producers and distributors, and said Association of exhibitors through said representatives that from and after the adoption of the use of said Standard form contract, all motion picture photoplays should be licensed by the producers and distributors and hired by the exhibitors for exhibition only upon the terms and conditions contained in said form of contract; that thereafter the said Association ratified the said agreement, and that since 1926, the said Standard Uniform Contract with certain modifications agreed to and adopted in 206 207

like manner from time to time, was used exclusively
208 by the said producers and distributors in selling, and by exhibitors including defendant in buying the license to exhibit same until the affirmance by the Supreme Court of the United States, of the case hereinbefore mentioned as the Paramount case.

It is further found that the adoption, ratification and use of said contract was secured by the means and in the manner set forth in the said Paramount case above cited.

IT IS FURTHER ORDERED that save and except that for the said Amendments of said Find-
209 ings, the plaintiff's Motion for the allowance of the said Amendments of said Findings as hereinbefore stated, be and is hereby in all things denied.

Dated June 19th, 1933.

BY THE COURT,

P. W. GUILFORD,
Judge.

MOTION FOR A NEW TRIAL.

210 PLEASE TAKE NOTICE that at the Court House in the City of Minneapolis, Minnesota, on Saturday, the 9th day of September, 1933, at 9 o'clock A. M., or as soon thereafter as counsel can be heard, plaintiff will move the Court for Judgment for plaintiff notwithstanding the decision in the above entitled action, or for a new trial upon the following ground, viz:

1. That the decision is not justified by the evidence or by the Findings. 211

2. That the decision is contrary to law.

3. That there were errors of law occurring at the trial and duly accepted to by the plaintiff.

4. That there is no evidence to support the Finding of Fact No. 5 and the evidence is contrary thereto.

5. That there is no evidence to support the court's Finding No. 7 and the evidence is contrary thereto.

6. That there is no evidence to support the court's Finding of Fact No. 8 and the evidence is contrary thereto. 212

7. That there is no evidence to support the court's Finding of Fact No. 9 and the evidence is contrary thereto.

8. There is no evidence to support the court's Finding of Fact No. 13 and the evidence is contrary thereto.

9. That Conclusion of Law No. 1 is not justified or supported by the evidence and is contrary thereto. 213

10. That Conclusions of Law No. 1 is not supported by the Findings of Fact and is contrary thereto.

11. That Conclusions of Law No. 2 is not justified by the evidence or the Findings and is contrary thereto.

The motion will be made and based upon the

pleadings and files, decision and settled case to be
214 signed by the Court.

SHEARER, BYARD & TROGNER,
Attorneys for Plaintiff.

Dated September 1, 1933.

TO DEFENDANT ABOVE NAMED, and
TO S. P. HALPERN, HIS ATTORNEY.

ORDER.

215 No. 314886.

The above entitled matter came on for hearing before the undersigned, one of the judges of the above named court, on October 14, 1933, at ten o'clock A. M., upon a motion by the plaintiff for judgment notwithstanding the decision, or, if said motion be denied, for a new trial, upon the grounds set forth in the notice of motion. Shearer, Byard & Trogner appeared as attorneys for plaintiff and Samuel P. Halpern appeared as attorney for defendant. The matter having been duly presented
216 and considered.

IT IS ORDERED that said motions and each of them, be and the same are hereby denied.

Dated, October 26, 1933.

Stay of twenty days.

BY THE COURT:

P. W. GUILFORD,
Judge.

MEMO.

Since the above case was decided and upon the motion for a new trial two more decisions have been called to the court's attention, United Artists Corporation v. Odeon Building, 248 N. W., 784 (Wis.), decided June 6, 1933, and Universal Film Exchanges v. West, 163 Miss., 272. Both of these decisions are favorable to the defendants therein and deny recovery. The Wisconsin decision is based almost entirely upon the principle that the arbitration plan embodied in the contract is so closely connected and tied up into the remainder of the contract that it must be said that the illegality permeates the whole contract. 217 218

This court is of the same opinion as before, to-wit, that no recovery can be had, upon the ground that the contract is illegal; first, because the arbitration plan is so connected with the remainder of the contract that the entire contract is tainted; second, because the contract violates the Sherman Anti-Trust law and is a void contract under the decisions of the United States Supreme Court construing that law; and that the decision of the United States Supreme Court in Paramount-Famous-Lasky Corporation v. United States, 282 U. S., 30, in no wise indicates that there is any intention on the part of the court to overrule its former decisions or to hold the law otherwise than previously held. 219

P. W. GUILFORD,
Judge.

220 STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin, Fourth Judicial District,

FOX FILM CORPORATION,
Plaintiff,

vs.

A. B. MULLER,
Defendant.

No. 314886

To MR. SAMUEL P. HALPERN, Attorney for the above named defendant and to Clerk of said District
221 Court:

PLEASE TAKE NOTICE, That the above named plaintiff appeal to the Supreme Court of the State of Minnesota, from an order of the said District Court entered herein on the 26th day of October, A. D. 1933, denying plaintiff's motion for judgment notwithstanding the court's decision, or if said motion be denied, then for a new trial of said action and from the whole thereof.

Dated the 10th day of November, A. D. 1933.

SHEARER, BYARD & TROGNER,
222 Attorneys for Plaintiff,
654 Security Building,
Minneapolis, Minn.

BOND

(A surety company bond in due form and amount was approved served and filed.)

Form E-782-3M sets-7-23-29-Sup.

Printed in U.S.A.

FOX FILM CORPORATION
Executive Offices:
850 Tenth Avenue
New York City

Pictures Marked O - Played

PLAINTIFF'S EXHIBIT A / 1082

PAGE TWO

BRANCH OFFICE COPY

William Fox
Movietone, Sound and Dialogue Productions

EXCHANGE Utica CONTRACT No. #29892 SALESMAN Jack Fahey

This agreement dated Sept 6-1929 is made between the Distributor and A B Mullen (referred to in this agreement as the "Exhibitor"), operating the Ruf Mohawk Theatre, located at No. ... Street, City (Town) of Mohawk State of N.Y.

SCHEDULE

Prod. No. / PHOTOPLAYS	A: Consecutive Days Run	A: Minimum Guaranteed License Fee per Photoplay	A: Gross receipts per Photoplay in excess of which Dist. shares	A: Dist. Percentage of excess	B: Synchronization and score charge	C: Aggregate of sums specified in columns A & B per photoplay	Exhibition Dates	DESCRIPTION
101 SUNNY SIDE UP ✓	2/3	$ VO	200	% VO	12 VO	62 VO	/	Musical comedy with Janet Gaynor and Charles Farrell
102 CAMEO KIRBY	2/3	VO	200	VO	12 VO	62 VO	/	Booth Tarkington's story in words and song with Norma Terris and J. Harold Murray
103 MARRIED IN HOLLYWOOD	2/3	VO	200	VO	12 VO	62 VO	/	Based on operetta by Oscar Straus featuring Norma Terris and J. Harold Murray
104 FOX MOVIETONE FOLLIES OF 1930 ✓	2/3	VO	200	VO	12 VO	62 VO	/	The 1930 edition of Movietone Follies
105 INTERNATIONAL REVUE Cheer up girls ✓	2/3	VO	200	VO	12 VO	62 VO	/	A sparkling revue with song, dance, music and spectacle
106 MELODIES OF 1930 ✓	2/3	VO	200	VO	12 VO	62 VO	—	An original musical comedy
107 AMERICAN BEAUTY REVUE Golden Calf	2/3	VO	200	VO	12 VO	62 VO	—	Colorful, musical revue
108 PLAYMATES	2/3	VO	200	VO	12 VO	62 VO	—	All talking & singing, with Janet Gaynor & Charles Farrell. Directed by Frank Borzage.
109 The Cock Eyed World	2/3	VO	~~200~~	VO	12 VO	62 VO	5&6 50	Based on story by Stallings and Anderson
110 The Dollar Princess	2/3	VO	200	VO	12 VO	62 VO	—	Based on famous Viennese Operetta by Leo Fall
111 Such Men Are Dangerous ✓	2/3	3V			12 VO	47 VO	—	Elinor Glyn's story
112 They Had to See Paris	2/3	3V			12 VO	47 VO		Will Rogers portrays lead in Homer Croy's book
113 Will Rogers No. 2 ✓	2/3	3V			12 VO	47 VO	—	Will Rogers—Title to be selected
114 Frozen Justice	2/3	3V			12 VO	47 VO		Lenore Ulric and Louis Wolheim in a melodramatic story
115 Gringa Rose ✓	2/3	3V			12 VO	47 VO	—	Lenore Ulric
116 Lucky Star	2/3	3V			12 VO	47 VO		Janet Gaynor, Charles Farrell and Frank Borzage
117 New Orleans FROLIC	2/3	3V			12 VO	47 VO	—	Stupendous starring and dancing musical show
118 The Sky Hawk	2/3	3V			12 VO	47 VO	—	Based on Liberty Magazine story "Chap Called Bardoli"
119 The Holy Devil ✓	2/3	3V			12 VO	47 VO	332 50	Based on book "Rasputin, the Holy Devil"
120 4 Devils ✓	2/3	3V			12 VO	47 VO	—	Janet Gaynor
121 Salute	2/3	30			10 VO	40 VO		Story of Annapolis and West Point, directed by John Ford
122 The Lone Star Ranger	2/3	30			10 VO	40 VO	—	Zane Grey's story
123 Well Dressed Man ✓	2/3	30			10 VO	40 VO	—	Featuring Victor McLaglen
124 The Cisco Kid ✓	2/3	30			10 VO	40 VO	—	Warner Baxter—Directed by Raoul Walsh

1

AGREEMENT, made in one party of the first part, and the party of the second part,

WITNESSETH: The

FIRST: The Distributor

duties appointed at the 1927 Motion

also warrants that any clauses in add

Rider, if any hereto annexed, are no

Rider to signed by the Exhibitor.

license fee, exhibition dates and any

Article.

SECOND: (a) The Distri

and described in the Schedule hereto

as hereinafter provided for the exhibi

such photoplays at the said theatre u

licensed hereunder for exhibition at

(b) In case any of such ph

Pictures during the period beginning A

written notice to the Distributor not

be given the Distributor shall deliver

annually thereafter," within two years

have expired and excluded as aforesa

Exhibitor.

THIRD: The Exhibitor ag

Schedule or determined as hereinafter

by the Exhibitor, nor to exhibit or to

photoplays, and for no other purpose.

FOURTH: The Exhibitor

shipment from the Distributor's Exch

FIFTH: Payment, if any,

SIXTH: During the life

license period," if any, in the Schedu

photoplay as fixed herein. If "protec

Distributor to grant such "protection" a

such "protection" shall be deemed to

SEVENTH: The Distributo

print suitable for exhibition of each

positive prints by the Distributor to t

the Exhibitor shall be deemed deliv

All deliveries other than at

the Exhibitor or at the place where th

The Exhibitor agrees to re

tribution from which the Exhibitor is

received by the Exhibitor, responsible

and customers from the Distributor's

exchange; or if directed by the Di

delivery of a positive print properly

receipt therefor obtained by the Exhib

If the Exhibitor fails to re

such print to any other exhibitor the

exhibitor as shall be determined by

EIGHTH: The exhibition

determined as follows:

1. The Distributor shall

Exhibitor, consistent with prior runs

unless shall be of no effect unless prio

2. Within fourteen days a

available date, by giving written noti

If the exhibition date is

in the following paragraph "A"

(A). If other dates within

so, then the Distributor shall designate

Exhibitor, by mailing fourteen days'

(B). If no other date or d

dates which shall be within a period

to the Distributor. If the Exhibitor fa

the same period by mailing to the Exh

If the Exhibitor fails to

time designate the exhibition date

exhibition date or dates; and if any

the "run" specified in the Schedule

of forty-five days commencing with

this paragraph, "the period of grace

of this Article.

3. The exhibition date or d

upon between the Distributor and the

4. In case this contract

required hereunder to exhibit more tha

NINTH: The Exhibitor sha

stolen or destroyed or injured in any

for such loss, theft, destruction or in

release the Exhibitor from liability ari

by the latter for lost or stolen prints

hereunder. The Exhibitor shall not b

transit from the Exhibitor. The Exhi

print. If any positive print shall be

to have been so damaged or destroyed

such print was received by the Exhibit

or destroyed.

TENTH: The Exhibitor sha

specified story, book, or play, or by s

corresponding to such identifying descr

or, as regards any photoplay based upo

The Distributor warrants tha

such in the Schedule.

ELEVENTH: This contract

that if the Exhibitor sells or disposes

of the Distributor and such assignment

liability hereunder, unless the Distrib

122	The Lone Star Ranger	✓	4/3	30			10%	40%	—	Zane Grey's story
123	Well Dressed Man	✓	4/3	30			10%	40%	—	Featuring Victor McLaglen
124	The Cisco Kid	✓	4/3	30			10%	40%	—	Warner Baxter—directed by Raoul Walsh
125	The River		4/3	30			10%	40%		Charles Farrell, Mary Duncan—Frank Borzage director—story by Tristram Tupper
126	Why Leave Home	✓	4/3	30			10%	40%	—	Musical comedy version of "Cradle Snatchers"
127	The Girl From Havana	✓	4/3	30			10%	40%	—	With Lois Lane and Paul Page. Directed by Benjamin Stoloff
128	City Girl	✓	4/3	30			10%	40%	—	Based on stage play "Mud Turtle", with Charles Farrell
129	Christina	✓	4/3	30			10%	40%	—	Janet Gaynor
130	Harmony at Home	✓	4/3	30			10%	40%	320	Musical comedy version of "The Family Upstairs"
131	SEVEN FACES Never Come Back	✓	4/3	25			10	35%	—	Based on story "Apes and Apemen", by Richard Connell
132	Morals	✓	4/3	25			10	35%	—	A talking drama of ever present problems
133	Budapest	✓	4/3	25			10	35%	—	Story of the gay life of Hungary
134	Girl Who Wasn't Wanted	✓	4/3	25			10	35%	—	With Lois Moran
135	Hurdy Gurdy Man	✓	4/3	25			10	35%	—	Featuring George Jessel
136	EXPLAINED BY RICHARD Conquistador	✓	4/3	25			10	35%	—	Based on Katherine Fullerton Gerould's novel
137	Big Time	✓	4/3	25			10	35%	—	Story of studio life in Hollywood, directed by Kenneth Hawks
138	Passing of the 3rd Floor Back	✓	4/3	25			10	35%	—	Based on Jerome K. Jerome's famous play
139	It Might Have Happened	✓	4/3	25			10	35%	350	Sensational story featuring Paul Muni
140	The Mad Musician	✓	4/3	25			10	35%	—	South sea story with Lois Moran
141	Listen to the Band	✓	4/3	20			10	30%	—	Musical jazz melange with Lois Lane, Sharon Lynn and David Rollins
142	Black Diamond	✓	4/3	20			10	30%	—	Musical Circus story, all star cast including Stepin Fetchit
143	The Power House	✓	4/3	20			10	30%	—	Story of Machine Age influencing our lives
144	The Last Waltz	✓	4/3	20			10	30%	—	Broadway life, past and present
145	The Bells of Toledo	✓	4/3	20			10	30%	—	A musical romance of modern Spain
146	SONS OF KENTUCKY [illegible]	✓	4/3	20			10	30%	—	Story of American turf
147	Three Sisters	✓	4/3	20			10	30%	—	A dramatic story of heart throbs and smiles
148	Street Corners	✓	4/3	20			10	30%	240	A story of restless, reckless, youth

1805.

148 The Exhibitor agrees to charge minimum admission prices to said theatre on the respective exhibition dates of the photoplays licensed hereunder as follows:

EVENINGS: Adults, Orchestra ... Balcony ... Children, Orchestra ... Balcony ... MATINEES: Adults, Orchestra ... Balcony ... Children, Orchestra ... Balcony ...

ADDITIONAL TERMS:—

42 Licensed

Protection—Run Perpetual over Annandale unless Annandale Chgs some admission price

APPROVED ADDITIONAL CLAUSES

or, as [illegible] any photoplay based upon

The Distributor warrants that

such in the Schedule

ELEVENTH: This contract

that if the Exhibitor sells or disposes

of the Distributor and such assignment

liability hereunder, unless the Distribu

TWELFTH: The Exhibi

telegraphic approval of the Distri

agrees to advertise and announce

issued by the Exhibitor relating t

by the Distributor.

All advertising accessories us

sold, loaned or given away by the Exhi

Unless this contract expressly

any of the photoplays herein provided t

completion of, the exhibition of such ph

The Distributor shall not in

Contract" with any other exhibitor.

THIRTEENTH: The Distrib

Distributor.

FOURTEENTH: The Exhib

delivery and or the exhibition of publi

of ordinance any such tax, fee or other

definitely fixed or cannot be exactly de

to fine, in the manner determined by

FIFTEENTH: The Exhibito

will charge for admission to said thea

for each exhibition and that such pho

SIXTEENTH: In case the E

reason of censor rulings, the elements,

delay or failure of performance with re

waived by the Distributor. In any suc

time of such delay, unless performance

respect to any such photoplay shall be

of such disability or prevention of per

months either party hereto may cancel

after the expiration of such three (3)

In case the Distributor shall

elements, accidents, strikes, fire, insurre

Postal authorities, delays in production

therein in time for delivery as herein

arising therefrom are hereby expressly

be extended for a period equal to the ti

any such photoplay during the period

any such cause or contingency is rende

performance by the Distributor shall be

shall deliver to the Exhibitor any such

delivery took place within the period he

hereof.

SEVENTEENTH: The waiv

default by such other party.

EIGHTEENTH: The parties

each shall submit to the Board of Arbi

Avenue, New York City, bearing date

a copy of which will be furnished to

be no such Board of Arbitration in ex

be made to a Board of Arbitration lo

and the rules of procedure and practic

The parties hereto further a

agree and consent that any such decisi

force; and each party hereto hereby g

any such Board of Arbitration, and c

In the event that the Exhibi

Contract which the Exhibitor may have

upon any such claim or controversy as

all other existing contracts between the

by the Distributor until the complete

determined by said Board of Arbitrat

additional sum within seven (7) days

terminate this contract.

In the event that the Distri

Exhibition Contract providing for arbi

of Arbitration upon any such claim or

Board of Arbitration is located, the E

registered mail within two (2) weeks a

or claims against any exhibitor until

shall not apply to any such claim or

Any such termination by eit

breach of contract by the other party.

The provisions of this contract

NINETEENTH: This cont

TWENTIETH: If the licens

wise, the Exhibitor shall have the right

the Distributor written notice to such e

same time the Exhibitor shall pay up th

one-half shall be disregarded. If any

for exhibition at another theatre where

amount paid by the Exhibitor to the D

by the Distributor.

If the license fee for any such

for the purpose of computing such one

hereunder for exhibition thereof shall

date of availability of such photoplay.

TWENTY-FIRST: If the E

public in the place where such theatre

within a reasonable time prior to the d

such Board of Arbitration shall ascerta

matter, then such photoplay shall be a

and where desired by the Distributor

If the Distributor shall be

place where the Exhibitor's theatre is

shall not thereafter be licensed for exhi

deemed licensed hereunder.

TWENTY-SECOND: This l

alteration or change by an officer of or

Distributor of any check or other consi

of any of the photoplays or the furnish

Unless notice of acceptance

after specified (immediately following t

after named them within the number o

Distributor shall forthwith return any

Cincinnati 20; Cleveland 18; Dallas 20

Memphis 20; Milwaukee 18; Northern N

Philadelphia 20; Pittsburgh 24; Portla

Protection—Run Protection over Annandale unless Annandale Clyo loses admission price

APPROVED ADDITIONAL CLAUSES

ROAD SHOWS—The Distributor shall have the right to exhibit and/or cause to be exhibited as a "roadshow", at any time prior to the exhibition thereof hereunder, each of the photoplays licensed hereunder as the Distributor may from time to time select and determine, provided, however, that such roadshow exhibitions shall be at theatres at which admission prices for evening performances, during such exhibitions thereof, of not less than one dollar shall be charged for the majority of the orchestra seats, and further provided that, except in the cities of New York and Los Angeles, not more than two of such photoplays shall be so roadshown.

If any such roadshow exhibition shall be in the city of New York, N. Y., and if the Exhibitor's theatre be situated in a territory then served by the Distributor's exchange or exchanges located in said City, the Distributor shall have the right to except and exclude from this license any such photoplay (not exceeding in the aggregate two of such photoplays) so roadshown in said City upon sending written notice to that effect to the Exhibitor not later than eight weeks after the commencement of such roadshow exhibition in such City, provided the Distributor shall by like notice except and exclude such photoplay from all other contracts containing this clause and licensing the exhibition of such photoplay in such territory. Such execution and exclusion shall not be effected in case the Distributor shall inadvertently omit to send such notice to any of such other exhibitors.

If any such roadshow exhibition shall be in the city of Los Angeles, Cal., and if the Exhibitor's theatre be situated in the territory then served by the Distributor's exchange or exchanges located in said City, the Distributor shall have the right to except and exclude from this license any such photoplay (not exceeding in the aggregate two of such photoplays) so roadshown in said City, upon the same terms and conditions above provided for the exception and exclusion of photoplays roadshown in the city of New York.

If and when any such roadshow exhibition (except any roadshow exhibition in New York and/or Los Angeles) shall be in the territory served by the Distributor's exchange or exchanges serving the Exhibitor's theatre, such photoplay so roadshown in such territory shall forthwith be excepted and excluded from this license. The Distributor shall send written notice to that effect, to the Exhibitor within fourteen (14) days after such roadshow exhibition commences.

The Distributor may as exercise such right to except and exclude any such photoplay from time to time, in the respective territories, as above defined, in the United States. Any photoplay so roadshown in any place in the United States, and not excepted and excluded from this license as aforesaid, shall not be deemed available for exhibition hereunder until after the completion of such roadshowing of such photoplay in the United States, and such photoplay shall be exhibited hereunder as and when available.

For each photoplay that the Distributor shall except and exclude, as aforesaid, the Exhibitor is hereby granted the option to except and exclude from this license one of the other photoplays licensed hereunder, but only if the Exhibitor shall give to the Distributor written notice to that effect not later than fourteen days before the date fixed for the exhibition hereunder of such other photoplay. The Distributor may exhibit and/or license the exhibition of any and all photoplays excepted and excluded from this license by the Distributor and/or the Exhibitor, as aforesaid, when and where desired by it, free from all claims of the Exhibitor in respect thereof.

PERCENTAGE BOOKINGS—If this contract calls for payment of any part thereof computed upon the Exhibitor's gross receipts, such payment or any part thereof shall be made daily, together with a correct itemized statement of the gross receipts of said theatre for admission thereto upon the exhibition date or dates of each photoplay for which payment is so required to be made. Should the Distributor so require, such itemized statement shall be made upon forms furnished by the Distributor. Upon such date or dates an authorized representative of the Distributor is hereby given the right to verify the sale of all tickets of admission to said theatre, and the receipts therefrom; and for such purpose shall have access to the theatre, including the box office, and also the right to examine the Exhibitor's books and records insofar as they relate to such gross receipts. The Distributor, or its authorized representative, shall also have access for a period of sixty (60) days after the receipt by the Distributor of the final box office statement, to all of the Exhibitor's books and records for the purpose of verifying such box office statement. The Distributor agrees that any information obtained by it pursuant to the provisions of this Clause will be treated as confidential, except in any arbitration proceeding or litigation in respect of this contract. The Distributor agrees, unless such representative be a regular employee of the Distributor, not to employ as such representative any person a resident of or regularly employed in the place where the Exhibitor's theatre is located, excepting with the consent of the Exhibitor.

LIQUIDATED DAMAGES, PERCENTAGE BOOKINGS—If the license fee of any photoplay licensed hereunder is to be computed either in whole or in part, upon a percentage of the gross admission receipts of said theatre, and if the Exhibitor fails or refuses to exhibit such photoplay as provided in this contract, the Exhibitor shall pay to the Distributor as liquidated damages for such day that the Exhibitor fails or refuses to exhibit such photoplay (in addition to any fixed sums payable hereunder in respect of such photoplay) a sum equal to such percentage of the average daily gross receipts of such theatre during the period of thirty (30) consecutive days immediately prior to the date or dates when such photoplay should have been so exhibited, provided, however, that if the Exhibitor shall exhibit such photoplay for less than the full number of days provided for in this contract, such sum equal to such percentage shall be computed, upon a sum equal to seventy-five per cent (75%) of the gross receipts of said theatre for the last day of the exhibition thereat of such photoplay.

END OF SCHEDULE

IN WITNESS WHEREOF, the parties hereto have duly executed these presents.

No. of Pictures Offered 48

No. of Pictures Contracted For 48

EXHIBITOR: A. B. Mullen

By .....

Salesman Jack Lorentz

FOX FILM CORPORATION

APPROVED ..... Vice-President

RIDER FOR SOUND PICTURES

This rider is in addition to and part of this Contract, which for convenience is printed hereon instead of attached hereto.

1. "Recorded Sound" as used herein shall be deemed to mean the spoken words, music, or other sounds recorded upon the positive print of a photoplay or upon a record, disc or other similar devices, separate and apart from a positive print, for use in synchronism therewith.

2. The Distributor grants to the Exhibitor and the latter accepts a license under the respective copyrights of the photoplays specified in the Schedule for which sound is recorded, and/or under any copyright which may be in force with respect to any matter included in such recorded sound, to reproduce such recorded sound in synchronism with the exhibition of such photoplays, but only at the theatre designated in the license to which this Rider is attached, and for the number of successive days in the Schedule specified.

3. This license to so reproduce such recorded sound is granted upon the Exhibitor's warranties and conditions as follows: (a) that the sound reproducing equipment installed in said theatre will operate reliably and efficiently to reproduce such recorded sound, with adequate volume and high quality, whether recorded upon the positive print or upon records, discs or other similar devices; and (b) that if copyrighted musical compositions are included in such recorded sound, the Exhibitor shall, at the time of the exhibition of such photoplays and the reproduction of such recorded sound, have an effective license from the American Society of Authors, Composers and Publishers publicly to perform the copyrighted musical compositions in the repertoire of said Society.

4. The Exhibitor agrees: (a) to return all sound records, discs or other similar devices, if any have been delivered to Exhibitor hereunder, and all parts thereof if damaged or broken, immediately following the last exhibition of the photoplay with which such sound records are used; and (b) if such recorded sound is recorded on records, discs or other similar devices, to replace with black blank positive stock, all parts removed from the positive print of any photoplay while in the Exhibitor's possession, but the Exhibitor shall have no right to remove any part of the positive print except as specifically authorized in the license to which this Rider is attached.

5. All of the provisions of the license to which this Rider is attached shall be deemed incorporated herein as if fully set forth, except that for the purposes of this Rider only, there shall be substituted for the words "photoplays" and "positive prints" the words "records, discs or other similar devices" (if any are produced and delivered), and there shall be substituted for the words "exhibition" and "exhibit" the words "reproduction" and "reproduce" where the context permits; and it is agreed that all claims and controversies arising hereunder shall be submitted for determination by arbitration, as provided in Article EIGHTEENTH of the said license.

6. The Distributor does not warrant that such recorded sound will be recorded on the positive print or on records, discs or other similar devices, the Distributor reserving the right to use any one or more methods of recording it may from time to time determine.

The Exhibitor agrees to start actual playing of the Forty-Eight Movietone, Sound and Dialogue Productions under this contract not later than 2/28/30

..... ; to be played and/or paid for at the rate of not less than ..... per week / per month

APPROVED

FOX FILM CORPORATION

IN WITNESS WHEREOF, the parties hereto have duly executed this Rider.

A. B. Mullen
EXHIBITOR

By ..... Vice-President

Printed in U.S.A.

PAGE TWO

BRANCH OFFICE COPY

29892

tions

MAN

Theatre.

e of

DESCRIPTION

comedy with Janet Gaynor and Farrell

rlington's story in words and song rnes Terrh and J. Harold Murray

n operetta by Oscar Straus featur- nes Terrh and J. Harold Murray

edition of Movietone Follies

ling revue with song, dance, music rtacle

sical musical comedy

musical revue

ing & singing, with Janet Gaynor & Farrell. Directed by Frank Borzage.

n story by Stallings and Anderson

famous Viennese Operette by Leo

Glyn's story

ynes portrays lead in Homer Croy's

ture—Title to be selected

Ulric and Louis Wolheim in a modern story

Ulric

Gaynor, Charles Farrell and Frank

ious singing and dancing musical

on Liberty Magazine story "Cheap Boarder"

on book "Rasputin, the Holy Devil"

Gaynor

Annapolis and West Point, directed Ford

ey's story

Victor McLaglen

Baxter—directed by Raoul Walsh

PAGE ONE

AGREEMENT, made in one or more counterparts between FOX FILM CORPORATION, a corporation (hereinafter referred to as "the Distributor"), party of the first part, and the Exhibitor hereinafter named and referred to as the "Exhibitor," operating the theatre or theatres hereinafter designated, party of the second part,

WITNESSETH: The parties hereto agree as follows:

Warranty as to Form

FIRST: The Distributor warrants that there is contained herein all of the numbered Articles of the "Standard Exhibition Contract" agreed upon by the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference (an authenticated copy of which has been filed with the American Arbitration Association). The Distributor also warrants that any clauses in addition thereto appearing upon the Schedule have been approved by such Contract Committee, and that any additional clauses appearing upon a Rider, if any hereto annexed, are not inconsistent with any of such numbered Articles. It is agreed that any clauses contained in such Rider shall be of no effect unless such Rider be signed by the Exhibitor. It is agreed that any agreement contained in the Schedule covering or describing what photoplays are licensed hereunder and in respect of any license fee, exhibition dates and any provision permitted by the provisions of the numbered Articles hereof shall not be deemed an additional clause for the purposes of this Article.

License

SECOND: (a) The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the Schedule hereto subject to the terms and conditions hereinafter stated to exhibit (during the period of one year commencing with the date fixed or determined as hereinafter provided for the exhibition in the theatre hereinafter designated of the first photoplay deliverable hereunder, unless otherwise in the Schedule provided) each of such photoplays at the said theatre only for the number of successive days in the said Schedule provided. If more than one theatre is hereinafter designated no photoplay is licensed hereunder for exhibition at more than one of such theatres unless otherwise specifically agreed upon in the Schedule.

(b) In case any of such photoplays (except photoplays which shall be "roadshown") shall not be "generally released" by the Distributor for distribution in the United States during the period beginning August 19, 1928 and ending August 17, 1929, such photoplays shall be excepted and excluded from this license unless the Exhibitor shall give written notice to the Distributor not later than thirty days after such last mentioned date that the Exhibitor elects to exhibit all of such photoplays hereunder. If such notice be given the Distributor shall deliver and the Exhibitor shall exhibit such photoplays as and when available for exhibition hereunder, except that any of such photoplays not so "generally released" within two years after such last mentioned date shall be also excepted and excluded. The Distributor may exhibit or license the exhibition of any photoplays excepted and excluded as aforesaid when and where desired by the Distributor, and all claims or causes of action in respect thereof are hereby expressly waived by the Exhibitor.

Time and Place of Exhibition

THIRD: The Exhibitor agrees to exhibit under said license said photoplays, but only at the theatre hereinafter specified, on the exhibition date or dates fixed in the Schedule or determined as hereinafter provided, and not to allow any positive print thereof to leave the Exhibitor's possession during the period specified for the exhibition thereof by the Exhibitor, nor to exhibit or to permit the exhibition of any such positive print at any other time or place. Such license shall be specifically for such exhibitions of such photoplays, and for no other purpose.

Payment

FOURTH: The Exhibitor agrees to pay for such license as to each of such photoplays the fixed sums herein specified at least three (3) days in advance of the date of shipment from the Distributor's Exchange or from the last previous exhibitor of the positive print thereof.

Payment on Account

FIFTH: Payment, if any, made upon the execution hereof by the Exhibitor shall be deemed payment on account of the sums last payable hereunder.

Protection and Run

SIXTH: During the life of this contract the Distributor agrees not to exhibit or license the exhibition of any such photoplays in conflict with the "run" or "protection period," if any, in the Schedule specified. Unless otherwise provided herein, such "protection period" shall be computed from the last date of exhibition of such photoplay as fixed herein. If "protection" is granted hereunder against a specified theatre or theatres which "protection" shall indicate that it was the intention of the Distributor to grant such "protection" against all of the theatres in the immediate neighborhood or vicinity of the Exhibitor's theatre, then, unless otherwise provided in the Schedule, such "protection" shall be deemed to apply to and include any theatre that may hereafter be opened in such neighborhood or vicinity.

Delivery and Return of Prints

SEVENTH: The Distributor agrees to deliver to the Exhibitor during the period specified in Article Second hereof or otherwise in the Schedule provided for a positive print suitable for exhibition of each of such photoplays for exhibition at the said theatre on the dates specified or on the dates determined as herein provided. Delivery of such positive prints by the Distributor to the Exhibitor at the Distributor's exchange or to a common carrier or to the United States postal authorities for mailing or to any agent of the Exhibitor shall be deemed delivery by the Distributor to the Exhibitor hereunder.

All deliveries other than at the Distributor's exchange shall be made in time to enable the carrier thereof in accordance with the carrier's time schedule to deliver to the Exhibitor or at the place where the Exhibitor's theatre is located prints at least one hour before the usual time for the opening of the Exhibitor's Theatre.

The Exhibitor agrees to return each positive print received by the Exhibitor hereunder, with the reels and containers furnished therewith, to the exchange of the Distributor from which the Exhibitor is served or as otherwise directed by the Distributor immediately after the last exhibition of such positive print, in the same condition as when received by the Exhibitor, reasonable wear and tear due to the proper use thereof excepted. The Exhibitor agrees to pay all costs of transportation of such positive prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of any of such positive prints (as the case may be) and return to the Distributor's exchange; or if directed by the Distributor, to ship such positive prints elsewhere than to the Distributor's exchange transportation charges collect. It is agreed that the delivery of a positive print properly directed and packed in the container furnished by the Distributor therefor, to a carrier designated or used by the Distributor and proper receipt therefor obtained by the Exhibitor, shall constitute the return of such positive print by the Exhibitor.

If the Exhibitor fails to or delays the return of any positive print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor the Exhibitor agrees to pay the Distributor the damage, if any, so caused the Distributor and in addition the damage, if any, so caused such other exhibitor as shall be determined by Arbitration as provided for in Article Eighteenth hereof.

Selection or Designation of Play Dates

EIGHTH: The exhibition date or dates of each photoplay, unless definitely specified or otherwise provided for in the Schedule, or otherwise agreed upon, shall be determined as follows:

1. The Distributor shall mail to the Exhibitor at least fifteen days' notice in writing of the date upon which each photoplay will be available for exhibition by the Exhibitor, consistent with prior runs and for protection heretofore or hereafter granted to other exhibitors (which date is hereinafter referred to as "the available date"). Such notice shall be of no effect unless prints of such photoplay are in the exchange of the Distributor from which the Exhibitor is served.

2. Within fourteen days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates within a thirty day period commencing with such available date, by giving written notice to the Distributor of the date, or dates, so selected.

If the exhibition date or dates so selected by the Exhibitor, are not open for the Exhibitor, then the exhibition date or dates shall be designated as provided in the following paragraphs "A" and "B":

(A). If other dates within said thirty day period are open the Exhibitor shall immediately select from such other open dates another date or other dates, failing in the so, then the Distributor shall designate the date or dates which shall be within a period not earlier than two weeks nor later than six weeks from the date first selected by the Exhibitor, by mailing fourteen days' notice thereof to the Exhibitor.

(B). If no other date or dates within said thirty day period are open (after the Exhibitor's written request therefor) then the Exhibitor shall designate the date or dates which shall be within a period not earlier than two, nor later than six weeks from the last date of the said thirty day period, by immediately giving written notice thereof to the Distributor. If the Exhibitor fails to immediately designate such date or dates, as provided in this paragraph "B", the Distributor shall designate the date or dates within the same period by mailing to the Exhibitor fourteen days' notice of such date or dates.

If the Exhibitor fails to make any selection within fourteen days after the mailing of the available dates of any photoplay, then the Distributor may at any time designate the exhibition date or dates thereof, which date shall not be prior to the available date, by mailing notice thereof at least fourteen days before such exhibition date or dates; and if any such photoplay shall have been exhibited by any other exhibitor having a "run" prior in point of time and immediately preceding the "run" specified in the Schedule granted to the Exhibitor, then the Distributor shall designate the exhibition date or dates thereof, which shall be within a period of forty-five days commencing with the available date. In case the exhibition date or dates of any of the photoplays shall be designated by the Distributor pursuant to this paragraph, "the period of protection," if any, specified in the schedule, shall begin upon the fifteenth (15th) day of the thirty day period specified in paragraph 2 of this Article.

3. The exhibition date or dates of any of the photoplays ordered by the Exhibitor (if available), or designated as in this Article Eighth provided, or otherwise agreed upon between the Distributor and the Exhibitor, shall be for all purposes the exhibition date or dates of such photoplay as fixed or determined hereunder, and the Exhibitor shall not be required hereunder to exhibit more than one photoplay of any such series every five weeks.

4. In case this contract embraces a series of feature photoplays, five reels or more in length and featuring a particular star or director, the Exhibitor shall not be required hereunder to exhibit more than one photoplay of any such series every five weeks.

Loss of and Damage to Prints

NINTH: The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange for each linear foot of any positive print lost, stolen or destroyed or injured in any way in the interval between the delivery thereof by the Distributor and the return thereof by the Exhibitor in full settlement of all claims for such loss, theft, destruction or injury. Such payment, however, shall not transfer title to or any interest in any such positive print to the Exhibitor or any other party, nor release the Exhibitor from liability arising out of any breach of this contract. The Distributor shall at the option of the Exhibitor repay or credit to the Exhibitor any sums paid by the latter for lost or stolen prints, excepting "news reels," upon their return to the Distributor within sixty (60) days after the date when the same should have been returned hereunder. The Exhibitor shall not be liable for the damage or destruction of any positive print, provided the Exhibitor establishes such damage or destruction occurred while in transit from the Exhibitor. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any positive print. If any positive print shall be received from the Exhibitor by the Distributor or any subsequent exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, prior to the second public exhibition thereof shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, and setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

Description and Titles of Photoplays Released

TENTH: The Exhibitor shall not be required to accept for any photoplay described in the Schedule as the photoplay of a star, or of a director, or based upon a specified story, book, or play, or by an identifying description, any other photoplay of a different star or different director, or based upon a different story, book or play, or not corresponding to such identifying description, as the case may be. Nothing herein contained shall limit the right of the Distributor to change the title of any of such photoplays, or, as regards any photoplay based upon any story, book or play, prevent the making of any alterations, changes in or adaptations thereof.

The Distributor warrants that none of the photoplays licensed hereunder are remakes from old negatives or old negatives renamed, except those specifically set forth as such in the Schedule.

Assignment Upon Sale of Theatre

ELEVENTH: This contract shall not be assigned by either party without the written acceptance of the assignee and the written consent of the other party: *provided*, that if the Exhibitor sells or disposes of his interest in the theatre hereinafter specified, he may assign this contract to the purchaser of such interest without the written consent of the Distributor and such assignment shall become effective upon the written acceptance thereof by the assignee; such assignment, however, shall not relieve the Exhibitor of liability hereunder, unless the Distributor consents in writing to release the Exhibitor from such liability.

Exhibition and Advertising

TWELFTH: The Exhibitor agrees to run photoplays (excepting "news reels") as delivered without alteration, excepting with the written or [illegible] of the Distributor, subject to requirements of duly authorized public authorities necessitating any change. The Exhibitor also [illegible] as a Fox Movietone Sound and Distinctive Production." In all newspaper advertising and publicity

...ford

...'s story

... Victor McLaglen

...Baxter—directed by Raoul Walsh

...Farrell, Mary Duncan—Frank Bor...rior—story by Tristram Tupper

... comedy version of "Cradle ..."

...n Lane and Paul Page. Directed ...min Stoloff

... stage play "Mad Turtle", with ...Farrell

...ayner

... comedy version of "The Family ..."

...n story "Apes and Angels", by ...Connell

...g drama of ever present problems

...f the gay life of Hungary

...in Moran

...g George Jessel

...on Katherine Fullerton Gerould's

...f studio life in Hollywood, directed ...moth Hawks

...n Jerome K. Jerome's famous play

...osal story featuring Paul Muni

...en story with Lois Moran

... jazz melange with Lola Lane, Lynn and David Rollins

... Circus story, all star cast including ...Fetchit

...f Machine Age influencing our lives

...ay life, past and present

...ral romance of modern Spain

...f American turf

...ntic story of heart throbs and smiles

... of restless, reckless, youth

...ed hereunder as follows:

...Children, Orchestra ..... Balcony .....

sported story, book, or play, or by an identifying description, any other photoplay of a different mar or different theme, or based upon a different story, book or play, or any corresponding to such identifying description, as the case may be. Nothing herein contained shall limit the right of the Distributor to change the title of any of such photoplays, or, as regards any photoplay based upon any story, book or play, prevent the making of any alterations, changes in or adaptations thereof.

The Distributor warrants that none of the photoplays licensed hereunder are remakes from old negatives or old negatives renamed, except those specifically set forth as such in the Schedule.

Title of Photoplays Released

ELEVENTH: This contract shall not be assigned by either party without the written acceptance of the assignee and the written consent of the other party; *provided*, that if the Exhibitor sells or disposes of his interest in the theatre hereinafter specified, he may assign this contract to the purchaser of such interest without the written consent of the Distributor and such assignment shall become effective upon the written acceptance thereof by the assignee; such assignment, however, shall not relieve the Exhibitor of liability hereunder, unless the Distributor consents in writing to release the Exhibitor from such liability.

Assignment Upon Sale of Theatre

TWELFTH: The Exhibitor agrees to run photoplays (excepting "news reels") as delivered without alteration, excepting with the written or telegraphic approval of the Distributor, subject to requirements of duly authorized public authorities necessitating any change. The Exhibitor also agrees to advertise and announce each photoplay as "A Fox Movietone, Sound and Dialogue Production." In all newspaper advertising and publicity issued by the Exhibitor relating to said photoplays the Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by the Distributor.

Exhibition and Advertising

All advertising accessories used by the Exhibitor in connection with the exhibition of said photoplays must be leased from or through the Distributor and must not be sold, leased or given away by the Exhibitor.

Unless this contract expressly provides for the "first run" in the City or Town wherein the theatre hereinafter specified is located, the Exhibitor agrees not to advertise any of the photoplays herein provided for by means of lithographs, slides, trailers, lobby displays, newspaper announcements, advertising or otherwise prior to, and until after the completion of, the exhibition of such photoplay by any other exhibitor having the right of the "first run" thereof in said City or Town.

The Distributor shall not in any wise be liable for any breach of the provisions of the immediately preceding paragraph contained in any other "Standard Exhibition Contract" with any other exhibitor.

Warranty as to Advertising

THIRTEENTH: The Distributor warrants that the photoplays herein provided for will not contain any advertising matter for which compensation is received by the Distributor.

Taxes

FOURTEENTH: The Exhibitor agrees to pay to the Distributor upon demand any tax, fee or other like charge now and/or hereafter imposed or based upon the delivery still or the exhibition of positive prints of the photoplays and/or upon the sums payable under this contract by the Exhibitor to the Distributor. If under any statute or ordinance any such tax, fee or other like charge is or shall be payable or paid by the Distributor and the exact amount payable hereunder by the Exhibitor is not therein definitely fixed or cannot be exactly determined then the Exhibitor agrees to pay such part of any such tax, fee or other like charge, paid or payable by the Distributor as shall be fixed in the manner determined by the then President of the American Arbitration Association.

Minimum Admission Charge

FIFTEENTH: The Exhibitor warrants and agrees that during the period each of the photoplays herein provided for shall be exhibited in said theatre the Exhibitor will charge for admission to said theatre an actual admission fee which shall not be less than ten cents, unless a greater minimum admission charge is herein elsewhere specified, for each exhibition and that such photoplays shall not be exhibited unless such admission fee is charged.

Delay in or Prevention of Performance

SIXTEENTH: In case the Exhibitor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of censor rulings, the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity or order of any Court of competent jurisdiction then such delay or failure of performance with respect to such photoplay shall be excused and all claims or causes of action for damages therefor, or arising therefrom, are hereby expressly waived by the Distributor. In any such event, the time of the Exhibitor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, unless performance thereof because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Exhibitor with respect to any such photoplay shall be waived. The resumption of performance by the Exhibitor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance, *provided*, that if such delay and/or prevention of performance, caused as aforesaid, shall continue for a period of three (3) months either party hereto may cancel this contract, but only with respect to any such photoplay the exhibition hereunder of which has been so delayed or prevented, by mailing after the expiration of such three (3) months' period to the other party notice in writing to such effect.

In case the Distributor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity, Court orders, censor rulings, delays of any common carrier, or of the United States Postal authorities, delays in production or failure of the producers of any of such photoplays to make or deliver same to the Distributor or of any star, or other performer to appear therein in time for delivery as herein provided, then such delay in or prevention of performance shall be excused and all claims or causes of action for damages thereby or arising therefrom are hereby expressly waived by the Exhibitor. In any such event, the time of the Distributor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, provided, however, that in case any such delay or prevention shall prevent the Distributor from "generally releasing" any such photoplay during the period specified in paragraph (b) of Article Second, the provisions of such paragraph shall govern, unless performance hereunder of the happening of any such cause or contingency is rendered impossible, in which case performance by the Distributor with respect to any such photoplay shall be waived. The resumption of performance by the Distributor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance and the Distributor shall deliver to the Exhibitor any such photoplay at the earliest available date thereafter, and such delivery in any such case shall be with the same force and effect as though delivery took place within the period herein above limited and the Exhibitor agrees to accept, pay for and exhibit any such photoplay at such later period pursuant to the terms hereof.

Waiver

SEVENTEENTH: The waiver by either party of any breach or default by the other party shall not be construed as a waiver of any other or subsequent breach or default by such other party.

Arbitration

EIGHTEENTH: The parties hereto agree that before either of them shall resort to any court to determine, enforce or protect the legal rights of either hereunder, each shall submit to the Board of Arbitration (established or constituted pursuant to the Rules of Arbitration filed with the American Arbitration Association, 347 Madison Avenue, New York City, bearing date May 1, 1928, and identified by the signatures of the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference, a copy of which will be furnished to the Exhibitor upon request) in the city wherein is situated the exchange of the Distributor from which the Exhibitor is served or if there be no such Board of Arbitration in such city then to the Board of Arbitration in the city nearest thereto (unless the parties hereto agree in writing that such submission shall be made to a Board of Arbitration located in another specified city), all claims and controversies arising hereunder for determination pursuant to the said Rules of Arbitration and the rules of procedure and practice adopted by such Board of Arbitration.

The parties hereto further agree to abide by and forthwith comply with any decision and award of such Board of Arbitration in any such arbitration proceeding, and agree and consent that any such decision or award shall be enforceable in or by any court of competent jurisdiction pursuant to the laws of such jurisdiction now or hereafter in force; and each party hereto hereby waives the right of trial by jury upon any issue arising under this contract, and agrees to accept as conclusive the findings of fact made by any such Board of Arbitration, and consents to the introduction of such findings in evidence in any judicial proceeding.

In the event that the Exhibitor shall fail or refuse to consent to submit to arbitration any claim or controversy arising under this or any other Standard Exhibition Contract which the Exhibitor may have with the Distributor or any other distributor or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy as submitted, the Distributor may, at its option, demand, for its protection and as security for the performance by the Exhibitor of this and all other existing contracts between the parties hereto, payment by the Exhibitor of an additional sum not exceeding $500 under each existing contract, such sum to be retained by the Distributor until the complete performance of all such contracts and then applied, at the option of the Distributor, against any sums finally due or against any damages determined by said Board of Arbitration to be due to the Distributor, the balance, if any to be returned to the Exhibitor; and in the event of the Exhibitor's failure to pay such additional sum within seven (7) days after demand, the Distributor may by written notice to the Exhibitor suspend service hereunder until said sum shall be paid and/or terminate this contract.

Option to Exclude if Group Licensed

In the event that the Distributor shall fail or refuse to consent to the submission to arbitration of any claim or controversy arising under this or any other Standard Exhibition Contract providing for arbitration which the Distributor may have with the Exhibitor, or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, within the number of days specified in Article Twenty-second, preceding the name of the City in which such Board of Arbitration is located, the Exhibitor may at his option terminate this and any other existing contract between the Exhibitor and the Distributor by mailing notice by registered mail within two (2) weeks after such failure or refusal, and in addition, the Distributor shall not be entitled to enforce from such Board of Arbitration upon any claim or claims against any exhibitor until the Distributor shall have complied with such decision, and in the meanwhile the provisions of the first paragraph of this Article Eighteenth shall not apply to any such claim or claims.

Any such termination by either party, however, shall be without prejudice to any other right or remedy which the party so terminating may have by reason of any such breach of contract by the other party.

Verbal Promises Inconsistent

The provisions of this contract relating to arbitration shall be construed according to the law of the State of New York.

NINETEENTH: *This contract is complete and no promises or representations have been made by either party to the other except as set forth herein.*

TWENTIETH: If the license herein granted shall apply to an entire group of feature photoplays offered by the Distributor to the Exhibitor at one time, and not otherwise, the Exhibitor shall have the right to exclude from this contract up to but not exceeding five per cent of the total number of such photoplays, but only if the Exhibitor shall give the Distributor written notice to such effect, at any time not later than fourteen (14) days before the date fixed for the exhibition of any such photoplay hereunder, and if at the same time the Exhibitor shall pay to the Distributor one-half of the license fee payable in respect of any such photoplay. In computing such ten per cent, fractions of less than one-half shall be disregarded. If any such photoplay shall, because of such exclusion, be thereafter licensed by the Distributor for the same run as that specified in this contract, for exhibition at another theatre where such excluded photoplay would not have been exhibited if not so excluded; then one-half of the license fee (up to but not exceeding the amount paid by the Exhibitor to the Distributor as a condition of so excluding such photoplay) received by the Distributor for such re-license, shall be credited to the Exhibitor by the Distributor.

If the license fee for any such photoplay so excluded is to be computed either in whole or in part upon a percentage of gross receipts of the Exhibitor's theatre, then for the purpose of computing such one-half of such license fee payable hereunder in respect of such photoplay, such gross receipts for each day that any such photoplay is licensed hereunder for exhibition thereat shall be deemed to be the average daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to such date of availability of such photoplay.

Exclusion Because of Racial or Religious Subject Matter

TWENTY-FIRST: If the Exhibitor shall claim that the exhibition at the theatre hereinafter specified of any photoplay licensed hereunder will be offensive to the public in the place where such theatre is located, because of racial or religious subject matter, and if the Exhibitor shall give written notice to the Distributor of such claim within a reasonable time prior to the date fixed for the exhibition thereof hereunder such claim shall be immediately submitted to the Board of Arbitration herein specified. If such Board of Arbitration shall specifically determine that the exhibition of such photoplay at such theatre will be offensive to said public because of racial or religious subject matter, then such photoplay shall be excluded from this contract, and not otherwise. The Distributor may exhibit or license the exhibition of any photoplay so excepted when and where desired by the Distributor free from all claims of the Exhibitor.

If the Distributor shall be of the opinion that any photoplay licensed hereunder will be offensive because of racial or religious subject matter, to the public in the place where the Exhibitor's theatre is located, the Distributor shall have the right to except and exclude such photoplay from this contract, upon condition that such photoplay shall not thereafter be licensed for exhibition in such place unless such racial or religious subject matter is eliminated therefrom in which case such photoplay shall again be deemed licensed hereunder.

Acceptance of Application

TWENTY-SECOND: This instrument shall be deemed an application for a license under copyright only and shall not become binding until accepted in writing without alteration or change by an officer of or any person duly authorized by the Distributor and notice of acceptance sent to the Exhibitor as herein provided. The deposit by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment on account of any sums payable hereunder or the delivery of a print of any of the photoplays or the furnishing of any advertising accessories shall not be deemed an acceptance hereof by the Distributor.

Unless notice of acceptance of this contract by the Distributor is sent to the Exhibitor by mail or telegraph within the number of days after the date hereof hereinafter specified (immediately following the name of the city wherein is situated the exchange of the Distributor from which the Exhibitor is served, or if such city is not hereinafter specified immediately following the city hereinafter named nearest thereto) said application shall be deemed withdrawn and the

Albany 10; Atlanta 30; Boston 16; Buffalo 10; Charleston 18; Charlotte 15; Chicago 15; Cincinnati 10; Cleveland 15; Dallas 1; Denver 17; Des Moines 9; Detroit 26; Indianapolis 9; Kansas City 6; Los Angeles 25; Little Rock 15; Louisville 12; Memphis 3; Milwaukee 3; Minneapolis 3; Oklahoma City 20; Omaha 2; Pueblo 10;

place where the Exhibitor's theatre is located, the Distributor shall have the right to excise and eliminate such photoplay from this contract, upon condition that such photoplay shall not thereafter be licensed for exhibition in such place unless such racial or religious subject matter is eliminated therefrom in which case such photoplay shall again be deemed licensed hereunder.

TWENTY-SECOND: This instrument shall be deemed an application for a license under copyright only and shall not become binding until accepted in writing without alteration or change by an officer of or any person duly authorized by the Distributor and notice of acceptance sent to the Exhibitor as herein provided. The deposit by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment on account of any sums payable hereunder or the delivery of a print of any of the photoplays or the furnishing of any advertising accessories shall not be deemed an acceptance hereof by the Distributor. **Acceptance of Application**

Unless notice of acceptance of this application by the Distributor is sent to the Exhibitor by mail or telegraph within the number of days after the date thereof hereinafter specified (immediately following the name of the city wherein is situated the exchange of the Distributor from which the Exhibitor is served, or if such city is not hereinafter named then within the number of days specified immediately following the city hereinafter named nearest thereto) said application shall be deemed withdrawn and the Distributor shall forthwith return any sums paid on account thereof by the Exhibitor. Albany 10; Atlanta 20; Boston 10; Buffalo 10; Charleston 15; Charlotte 15; Chicago 10; Cincinnati 20; Cleveland 15; Dallas 30; Denver 20; Des Moines 15; Detroit 15; Indianapolis 15; Jacksonville 15; Kansas City 15; Los Angeles 25; Little Rock 15; Louisville 15; Memphis 20; Milwaukee 15; Northern New Jersey 7; Minneapolis 20; Butte 30; New Haven 10; New Orleans 15; New York City 7; Oklahoma City 20; Omaha 20; Peoria 15; Philadelphia 10; Pittsburgh 14; Portland, Ore. 30; St. Louis 15; Salt Lake City 30; San Francisco 20; Seattle 30; Washington, D. C. 14.

This application and any application for other photoplays of the Distributor executed by the Exhibitor at the same time shall, for the purpose of this Article only, be deemed one application unless an agreement to the contrary contained in the Schedule is specifically signed by the Exhibitor.

A copy of this application, signed by the Exhibitor, shall be left with the Exhibitor at the time of signing, and in the event of acceptance thereof as above provided, a duplicate copy signed by the Distributor shall be forwarded to the Exhibitor.

*DIRECTION TO SALESMEN: *While you have every right to make known prospective customers to obtain the best offer possible for our product, after you have selected a particular exhibitor whose offer you believe to be the best obtainable and take a written application from such exhibitor, you are hereby directed to forward the application to the office of your company and make no further effort to sell the same service to any other exhibitor directly competing with such exhibitor until the application so forwarded has been duly rejected, accepted or withdrawn in accordance with its terms. A violation of this direction will subject you to discharge.*

AGREEMENT, made in one or more counterparts between **FOX FILM CORPORATION** a corporation (hereinafter referred to as "the Distributor"), party of the first part, and the Exhibitor hereinafter named and referred to as the "Exhibitor," operating the theatre or theatres hereinafter designated, party of the second part,

Form E 781-32M-4-29 Sup. Pr

FOX FILM CORPORATION
Executive Offices:
850 TENTH AVENUE
NEW YORK, N. Y.

WITNESSETH: The parties hereto agree as follows:

FIRST: The Distributor warrants that there is contained herein all of the numbered Articles of the "Standard Exhibition Contract" agreed upon by the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference (an authenticated copy of which has been filed with the American Arbitration Association). The Distributor also warrants that any clauses in addition thereto appearing upon the Schedule have been approved by such Contract Committee, and that any additional clauses appearing upon a Rider, if any hereto annexed, are not inconsistent with any of such numbered Articles. It is agreed that any clauses contained in such Rider shall be of no effect unless such Rider be signed by the Exhibitor. It is agreed that any agreement contained in the Schedule covering or describing what photoplays are licensed hereunder and in respect of any license fee, exhibition dates and any provision permitted by the provisions of the numbered Articles hereof shall not be deemed an additional clause for the purposes of this Article. — **Warranty as to Form**

SECOND: (a) The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the Schedule herein subject to the terms and conditions hereinafter stated to exhibit (during the period of one year commencing with the date fixed or determined as hereinafter provided for the exhibition in the theatre hereinafter designated of the first photoplay deliverable hereunder, unless otherwise in the Schedule provided) such photoplays at the said theatre only for the number of successive days in the said Schedule provided. If more than one theatre is hereinafter designated no photoplay is licensed hereunder for exhibition at more than one of such theatres unless otherwise specifically agreed upon in the Schedule. — **License**

(b) In case any of such photoplays (except photoplays which shall be "readyknown") shall not be "generally released" by the Distributor for distribution in the United States during the period beginning August 19, 1928 and ending August 17, 1930, such photoplays shall be excepted and excluded from this license unless the Exhibitor shall give written notice to the Distributor not later than thirty days after such last mentioned date that the Exhibitor elects to exhibit all of such photoplays hereunder. If such notice be given the Distributor shall deliver and the Exhibitor shall exhibit such photoplays as and when available for exhibition hereunder, except that any of such photoplays not so "generally released" within two years after such last mentioned date shall be also excepted and excluded. The Distributor may exhibit or license the exhibition of any photoplays excepted and excluded as aforesaid when and where desired by the Distributor, and all claims or causes of action in respect thereof are hereby expressly waived by the Exhibitor. — ½ — ½

THIRD: The Exhibitor agrees to exhibit under said license said photoplays, but only at the theatre hereinafter specified, on the exhibition date or dates fixed in the Schedule or determined as hereinafter provided, and not to allow any positive print thereof to leave the Exhibitor's possession during the period specified for the exhibition thereof by the Exhibitor, nor to exhibit or to permit the exhibition of any such positive print at any other time or place. Such license shall be specifically for such exhibition of such photoplays, and for no other purpose. — **Time and Place of Exhibition**

FOURTH: The Exhibitor agrees to pay for such license as to each of such photoplays the fixed sums herein specified at least three (3) days in advance of the date of shipment from the Distributor's Exchange or from the last previous exhibitor of the positive print thereof. — **Payment**

FIFTH: Payment, if any, made upon the execution hereof by the Exhibitor shall be deemed payment on account of the sums last payable hereunder. — **Payment on Account**

SIXTH: During the life of this contract the Distributor agrees not to exhibit or license the exhibition of any such photoplays in conflict with the "run" or "protection period," if any, in the Schedule specified. Unless otherwise provided herein, such "protection period" shall be computed from the last date of exhibition of each photoplay as fixed herein. If "protection" is granted hereunder against a specified theatre or theatres which "protection" shall indicate that it was the intention of the Distributor to grant such "protection" against all of the theatres in the immediate neighborhood or vicinity of the Exhibitor's theatre, then, unless otherwise provided in the Schedule, such "protection" shall be deemed to apply to and include any theatre that may hereafter be opened in such neighborhood or vicinity. — **Protection and Run**

SEVENTH: The Distributor agrees to deliver to the Exhibitor during the period specified in Article Second hereof or otherwise in the Schedule provided for a positive print suitable for exhibition of each of such photoplays for exhibition at the said theatre on the dates specified or on the dates determined as herein provided. Delivery of such positive prints by the Distributor to the Exhibitor at the Distributor's exchange or to a common carrier or to the United States postal authorities for mailing or to any agent of the Exhibitor shall be deemed delivery by the Distributor to the Exhibitor hereunder. — **Delivery and Return of Prints**

All deliveries other than at the Distributor's exchange shall be made in time to enable the carrier thereof in accordance with the carrier's time schedule to deliver to the Exhibitor or at the place where the Exhibitor's theatre is located prints at least one hour before the usual time for the opening of the Exhibitor's Theatre.

The Exhibitor agrees to return each positive print received by the Exhibitor hereunder, with the reels and containers furnished therewith, to the exchange of the Distributor from which the Exhibitor is served or as otherwise directed by the Distributor immediately after the last exhibition of such positive print, in the same condition as when received by the Exhibitor reasonable wear and tear due to the proper use thereof excepted. The Exhibitor agrees to pay all costs of transportation of such positive prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of any of such positive prints (as the case may be) and return to the Distributor's exchange; or if directed by the Distributor, to ship such positive prints elsewhere than to the Distributor's exchange transportation charges collect. It is agreed that the delivery of a positive print properly directed and packed in the container furnished by the Distributor therefor, to a carrier designated or used by the Distributor and proper receipt therefor obtained by the Exhibitor, shall constitute the return of such positive print by the Exhibitor.

If the Exhibitor fails to or delays the return of any positive print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor the Exhibitor agrees to pay the Distributor the damage, if any, so caused the Distributor and in addition the damage, if any, so caused such other exhibitor as shall be determined by Arbitration as provided for in Article Eighteenth hereof.

EIGHTH: The exhibition date or dates of each photoplay, unless definitely specified or otherwise provided for in the Schedule, or otherwise agreed upon, shall be determined as follows: — **Selection or Designation of Play Dates**

1. The Distributor shall mail to the Exhibitor at least fifteen days' notice in writing of the date upon which each photoplay will be available for exhibition by the Exhibitor, consistent with prior runs and/or protection heretofore or hereafter granted to other exhibitors (which date is hereinafter referred to as "the available date"). Such notice shall be of no effect unless prints of such photoplay are in the exchange of the Distributor from which the Exhibitor is served.

2. Within fourteen days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates within a thirty day period commencing with such available date, by giving written notice to the Distributor of the date, or dates, so selected.

If the exhibition date or dates so selected by the Exhibitor, are not open for the Exhibitor, then the exhibition date or dates shall be designated as provided in the following paragraphs "A" and "B";

(A). If other dates within said thirty day period are open the Exhibitor shall immediately select from such other open dates another date or other dates, failing to do so, then the Distributor shall designate the date or dates which shall be within a period not earlier than two weeks nor later than six weeks from the date first selected by the Exhibitor, by mailing fourteen days' notice thereof to the Exhibitor.

(B). If no other date or dates within said thirty day period are open (after the Exhibitor's written request therefor) then the Exhibitor shall designate the date or dates which shall be within a period not earlier than two, nor later than six weeks from the last date of the said thirty day period, by immediately giving written notice thereof to the Distributor. If the Exhibitor fails to immediately designate such date or dates, as provided in this paragraph "B", the Distributor shall designate the date or dates within the same period by mailing to the Exhibitor fourteen days' notice of such date or dates.

If the Exhibitor fails to make any selection within fourteen days after the mailing of the available dates of any photoplay, then the Distributor may at any time designate the exhibition date or dates thereof, which date shall not be prior to the available date, by mailing notice thereof at least fourteen days before such exhibition date or dates; and if any such photoplay shall have been exhibited by any other exhibitor having a "run" prior in point of time and immediately preceding the "run" specified in the Schedule granted to the Exhibitor, then the Distributor shall designate the exhibition date or dates thereof, which shall be within a period of forty-five days commencing with the available date. In case the exhibition date or dates of any of the photoplays shall be designated by the Distributor pursuant to this paragraph, "the period of protection," if any, specified in the schedule, shall begin upon the fifteenth (15th) day of the thirty day period specified in paragraph 2 of this Article.

3. The exhibition date or dates of any of the photoplays selected by the Exhibitor (if available), or designated as in this Article Eighth provided, or otherwise agreed upon between the Distributor and the Exhibitor, shall be for all purposes the exhibition date or dates of such photoplay as though definitely specified in the schedule.

4. In case this contract embraces a series of feature photoplays, five reels or more in length and featuring a particular star or director, the Exhibitor shall not be required hereunder to exhibit more than one photoplay of any such series every five weeks.

NINTH: The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange for each linear foot of any positive print lost, stolen or destroyed or injured in any way in the interval between the delivery thereof by the Distributor and the return thereof by the Exhibitor in full settlement of all claims for such loss, theft, destruction or injury. Such payment, however, shall not transfer title to or any interest in any such positive print to the Exhibitor or any other party, nor relieve the Exhibitor from liability arising out of any breach of this contract. The Distributor shall at the option of the Exhibitor repay or credit to the Exhibitor any sums paid by the latter for lost or stolen prints, excepting "news reels," upon their return to the Distributor within sixty (60) days after the date when the same should have been returned hereunder. The Exhibitor shall not be liable for the damage or destruction of any positive print, provided the Exhibitor establishes such damage or destruction occurred while in transit from the Exhibitor. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any positive print. If any positive print shall be received from the Exhibitor by the Distributor or any subsequent exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, prior to the second public exhibition thereof shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, and setting forth fully the nature of such damage and the amount of footage so damaged or destroyed. — **Loss of and Damage to Prints**

TENTH: The Exhibitor shall not be required to accept for any photoplay described in the Schedule as the photoplay of a star, or of a director, or based upon a specified story, book or play, or by an identifying description, any other photoplay of a different star or different director, or based upon a different story, book or play, or not corresponding to such identifying description, as the case may be. Nothing herein contained shall limit the right of the Distributor to change the title of any of such photoplays, or, as regards any photoplay based upon any story, book or play, prevent the making of any alterations, changes in or adaptations thereof.

The Distributor warrants that none of the photoplays licensed hereunder are releases from old negatives or old negatives renamed, except those specifically set forth as such in the Schedule. — **Description and Titles of Photoplays Released**

ELEVENTH: This contract shall not be assigned by either party without the written acceptance of the assignee and the written consent of the other party; *provided*, that if the Exhibitor sells or disposes of his interest in the theatre hereinafter specified, he may assign this contract to the purchaser of such interest without the written consent of the Distributor and such assignment shall become effective upon the written acceptance thereof by the assignee; such assignment, however, shall not relieve the Exhibitor of liability hereunder, unless the Distributor consents in writing to release the Exhibitor from such liability. — **Assignment Upon Sale of Theatre**

TWELFTH: The Exhibitor agrees to run photoplays (excepting "news reels") as delivered without alteration, excepting with the written or telegraphic approval of the Distributor, subject to requirements of duly authorized public authorities necessitating any change. The Exhibitor also agrees to advertise and announce each photoplay as "A Fox Movietone, Sound and Dialogue Production." In all newspaper advertising and publicity matter for the Exhibitor relating to said photoplays the Exhibitor shall adhere to the form of announcement contained in the advertising matter issued — **Exhibition and Advertising**

EXCHANGE ..... Buffalo

This agreement dated Aug ...

(referred to in this agreement as ...

located at No. .....

PRODUCTION No.

KNIGHTS OUT

✓ ALL STEAMED UP

✓ HIRED AND FIRED

DETECTIVES WANTED

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or, as respects any photoplay based upon any story, book or play, prevent the making of any alterations, changes in or adaptations thereof.

and Titles of Photoplays

The Distributor warrants that none of the photoplays licensed hereunder are reissues from old negatives or old negatives renamed, except those specifically set forth as such in the Schedule. **Reissues**

ELEVENTH: This contract shall not be assigned by either party without the written acceptance of the assignee and the written consent of the other party; *provided*, that if the Exhibitor sells or disposes of his interest in the theatre hereinafter specified, he may assign this contract to the purchaser of such interest without the written consent of the Distributor and such assignment shall become effective upon the written acceptance thereof by the assignee; such assignment, however, shall not relieve the Exhibitor of liability hereunder, unless the Distributor consents in writing to release the Exhibitor from such liability. **Assignment Upon Sale of Theatre**

TWELFTH: The Exhibitor agrees to run photoplays (excepting "news reels") as delivered without alteration, excepting with the written or telegraphic approval of the Distributor, subject to requirements of duly authorized public authorities necessitating any change. The Exhibitor also agrees to advertise and announce each photoplay as "A Fox Movietone, Sound and Dialogue Production." In all newspaper advertising and publicity issued by the Exhibitor relating to said photoplays the Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by the Distributor. **Exhibition and Advertising**

All advertising accessories used by the Exhibitor in connection with the exhibition of said photoplays must be leased from or through the Distributor and must not be sold, leased or given away by the Exhibitor.

Unless this contract expressly provides for the "first run" in the City or Town wherein the theatre hereinafter specified is located, the Exhibitor agrees not to advertise any of the photoplays herein provided for by means of lithographs, slides, trailers, lobby displays, newspaper announcements, advertising or otherwise prior to, and until after the completion of, the exhibition of such photoplay by any other exhibitor having the right of the "first run" thereof in said City or Town.

The Distributor shall not in any wise be liable for any breach of the provisions of the immediately preceding paragraph contained in any other "Standard Exhibition Contract" with any other exhibitor.

THIRTEENTH: The Distributor warrants that the photoplays herein provided for will not contain any advertising matter for which compensation is received by the Distributor. **Warranty as to Advertising**

FOURTEENTH: The Exhibitor agrees to pay to the Distributor upon demand any tax, fee or other like charge now and/or hereafter imposed or based upon the delivery and/or the exhibition of positive prints of the photoplays and/or upon the sums payable under this contract by the Exhibitor to the Distributor. If under any statute or ordinance any such tax, fee or other like charge is or shall be payable or paid by the Distributor and the exact amount payable hereunder by the Exhibitor is not therein definitely fixed or cannot be exactly determined then the Exhibitor agrees to pay such part of any such tax, fee or other like charge, paid or payable by the Distributor as shall be fixed in the manner determined by the then President of the American Arbitration Association. **Taxes**

FIFTEENTH: The Exhibitor warrants and agrees that during the period each of the photoplays herein provided for shall be exhibited in said theatre the Exhibitor will charge for admission to said theatre an actual admission fee which shall not be less than ten cents, unless a greater minimum admission charge is herein elsewhere specified, for each exhibition and that each photoplays shall not be exhibited unless such admission fee is charged. **Minimum Admission Charge**

SIXTEENTH: In case the Exhibitor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of censor rulings, the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity or order of any Court of competent jurisdiction then such delay or failure of performance with respect to such photoplay shall be excused and all claims or causes of action for damages therefor, or arising therefrom, are hereby expressly waived by the Distributor. In any such event, the time of the Exhibitor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, unless performance thereof because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Exhibitor with respect to any such photoplay shall be waived. The resumption of performance by the Exhibitor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance, *provided*, that if such delay and/or prevention of performance, caused as aforesaid, shall continue for a period of three (3) months either party hereto may cancel this contract, but only with respect to any such photoplay the exhibition hereunder of which has been so delayed or prevented, by sending after the expiration of such three (3) months' period to the other party notice in writing to such effect. **Delay in or Prevention of Performance**

In case the Distributor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity, Court orders, censor rulings, delays of any common carrier, or of the United States Postal authorities, delays in production or failure of the producers of any of such photoplays to make or deliver them to the Distributor or of any star or other performer to appear therein in time for delivery as herein provided, then such delay in or prevention of performance shall be excused and all claims or causes of action for damages therefor or arising therefrom are hereby expressly waived by the Exhibitor. In any such event, the time of the Distributor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, provided, however, that in case any such delay or prevention shall prevent the Distributor from "generally releasing" any such photoplay during the period specified in paragraph (b) of Article Second, the provisions of such paragraph shall govern, unless performance because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Distributor with respect to any such photoplay shall be waived. The resumption of performance by the Distributor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance and the Distributor shall deliver to the Exhibitor any such photoplay at the earliest available date thereafter, and such delivery in any such case shall be with the same force and effect as though delivery took place within the period herein above limited and the Exhibitor agrees to accept, pay for and exhibit any such photoplay at such later period pursuant to the terms hereof.

SEVENTEENTH: The waiver by either party of any breach or default by the other party shall not be construed as a waiver of any other or subsequent breach or default by such other party. **Waiver**

EIGHTEENTH: The parties hereto agree that before either of them shall resort to any court to determine, enforce or protect the legal rights of either hereunder, such shall submit to the Board of Arbitration (established or constituted pursuant to the Rules of Arbitration filed with the American Arbitration Association, 345 Madison Avenue, New York City, bearing date May 1, 1928, and identified by the signatures of the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference, a copy of which will be furnished to the Exhibitor upon request) in the city wherein is situated the exchange of the Distributor from which the Exhibitor is served or if there be no such Board of Arbitration in such city then to the Board of Arbitration in the city nearest thereto (unless the parties hereto agree in writing that such submission shall be made to a Board of Arbitration located in another specified city) all claims and controversies arising hereunder for determination pursuant to the said Rules of Arbitration and the rules of procedure and practice adopted by such Board of Arbitration. **Arbitration**

The parties hereto further agree to abide by and forthwith comply with any decision and award of such Board of Arbitration in any such arbitration proceeding, and agree and consent that any such decision or award shall be enforceable in or by any court of competent jurisdiction pursuant to the laws of such jurisdiction now or hereafter in force; and each party hereto waives the right of trial by jury upon any issue arising under this contract, and agrees to accept as conclusive the findings of fact made by any such Board of Arbitration, and consents to the introduction of such findings in evidence in any judicial proceeding.

In the event that the Exhibitor shall fail or refuse to consent to submit to arbitration any claim or controversy arising under this or any other Standard Exhibition Contract which the Exhibitor may have with the Distributor or any other distributor or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, the Distributor may, at its option, demand, for its protection and as security for the performance by the Exhibitor of this and all other existing contracts between the parties hereto, payment by the Exhibitor of an additional sum not exceeding $500 under each existing contract, such sum to be retained by the Distributor until the complete performance of all such contracts and then applied, at the option of the Distributor, against any sums finally due or against any damages determined by said Board of Arbitration to be due to the Distributor, the balance, if any, to be returned to the Exhibitor; and in the event of the Exhibitor's failure to pay such additional sum within seven (7) days after demand, the Distributor may by written notice to the Exhibitor suspend service hereunder until said sum shall be paid and/or terminate this contract.

In the event that the Distributor shall fail or refuse to consent to the submission to arbitration of any claim or controversy arising under this or any other Standard Exhibition Contract providing for arbitration which the Distributor may have with the Exhibitor, or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, within the number of days specified in Article Twenty-second, especially the name of the City in which such Board of Arbitration is located, the Exhibitor may at his option terminate this and any other existing contract between the Exhibitor and the Distributor by mailing notice by registered mail within ten days after such failure or refusal, and in addition, the Distributor shall not be entitled to recover from such Board of Arbitration upon any claim or counter-claim submitted until the Distributor shall have complied with such decision, and to the meanwhile the provisions of the first paragraph of this Article Eighteenth shall not apply to any such claim or claims.

Any such termination by either party, however, shall be without prejudice to any other right or remedy which the party so terminating may have by reason of any such breach of contract by the other party.

The provisions of this contract relating to arbitration shall be construed according to the law of the State of New York. **Verbal Promises; Representation**

NINETEENTH: *This contract is complete and no promises or representations have been made by either party to the other except as set forth herein.*

TWENTIETH: If the license herein granted shall apply to an entire group of feature photoplays offered by the Distributor to the Exhibitor at one time, and not otherwise, the Exhibitor shall have the right to exclude from this contract on or about one-half of the total number of such photoplays, but only if the Exhibitor shall give the Distributor written notice to such effect at any time not later than fourteen (14) days before the date fixed for the exhibition of any such photoplay hereunder, and if at the time when the Exhibitor shall pay the Distributor one-half of the license fee payable in respect of any such photoplay in computing such one per cent. fractions of less than one-half shall be disregarded. If any such photoplay shall consist of such component parts as are licensed by the Distributor for the same run as that specified in this contract, for exhibition at another theatre where such excluded photoplay would not have been exhibited, if not so excluded, then one-half of the license fee (up to but not exceeding the amount paid by the Exhibitor to the Distributor as a condition of so excluding such photoplay) received by the Distributor for such re-license, shall be credited to the Exhibitor by the Distributor. **Option to Exclude if Group Licensed**

If the license fee for any such photoplay so excluded is to be computed either in whole or in part upon a percentage of gross receipts of the Exhibitor's theatre, then for the purpose of computing such one-half of such license fee payable hereunder in respect of such photoplay, such gross receipts for each day that any such photoplay is licensed hereunder for exhibition, thereof shall be deemed to be the average daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to such date of availability of such photoplay.

TWENTY-FIRST: If the Exhibitor shall claim that the exhibition at the theatre hereinafter specified of any photoplay licensed hereunder will be offensive to the public in the place where such theatre is located, because of racial or religious subject matter, and if the Exhibitor shall give written notice to the Distributor of such claim within a reasonable time prior to the date fixed for the exhibition thereof hereunder, such claim shall be immediately submitted to the Board of Arbitration herein specified. If such Board of Arbitration shall reasonably determine that the exhibition of such photoplay at such theatre will be offensive to said public because of racial or religious subject matter, then such photoplay shall be excepted from this contract, and not otherwise. The Distributor may exhibit or license the exhibition of any photoplay so excepted when and where desired by the Distributor free from all claims of the Exhibitor. **Racial or Religious Subject Matter**

If the Distributor shall be of the opinion that any photoplay licensed hereunder will be offensive because of racial or religious subject matter, to the public in the place where the Exhibitor's theatre is located, the Distributor shall have the right to except and exclude such photoplay from this contract, upon condition that such photoplay shall not thereafter be licensed for exhibition in such place unless such racial or religious subject matter is eliminated therefrom in which case such photoplay shall again be deemed licensed hereunder.

TWENTY-SECOND: This instrument shall be deemed an application for a license under contract only and shall not become binding until accepted in writing without alteration or change by an officer of or any person duly authorized by the Distributor and notice of acceptance sent to the Exhibitor as herein provided. The deposit by the Exhibitor of any check or other consideration given by the Exhibitor at the time of application as payment on account of any sums payable hereunder or the delivery of a print of any of the photoplays or the furnishing of any advertising accessories shall not be deemed an acceptance hereof by the Distributor. **Acceptance of Application**

Unless notice of acceptance of this application by the Distributor is sent to the Exhibitor in such an acceptance within the number of days after the date thereof herein-

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...tract with any other exhibitor.

THIRTEENTH: The Distributor warrants that the photoplays herein provided for will not contain any advertising matter for which compensation is received by the Distributor. **Warranty as to Advertising**

FOURTEENTH: The Exhibitor agrees to pay to the Distributor upon demand any tax, fee or other like charge now and/or hereafter imposed or based upon the delivery and/or the exhibition of positive prints of the photoplays and/or upon the sums payable under this contract by the Exhibitor to the Distributor. If under any statute or ordinance any such tax, fee or other like charge is or shall be payable or paid by the Distributor and the exact amount payable hereunder by the Exhibitor is not therein definitely fixed or cannot be exactly determined then the Exhibitor agrees to pay such part of any such tax, fee or other like charge, paid or payable by the Distributor as shall be fixed in the manner determined by the then President of the American Arbitration Association. **Taxes**

FIFTEENTH: The Exhibitor warrants and agrees that during the period each of the photoplays herein provided for shall be exhibited in said theatre the Exhibitor will charge for admission to said theatre an actual admission fee which shall not be less than ten cents, unless a greater minimum admission charge is herein elsewhere specified, for each exhibition and that such photoplays shall not be exhibited unless such admission fee is charged. **Minimum Admission Charge**

SIXTEENTH: In case the Exhibitor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of censor rulings, the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity or order of any Court of competent jurisdiction then such delay or failure of performance with respect to such photoplay shall be excused and all claims or causes of action for damages therefor, or arising therefrom, are hereby expressly waived by the Distributor. In any such event, the time of the Exhibitor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, unless performance thereof because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Exhibitor with respect to any such photoplay shall be waived. The resumption of performance by the Exhibitor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance, *provided*, that if such delay and/or prevention of performance, caused as aforesaid, shall continue for a period of three (3) months either party hereto may cancel this contract, but only with respect to any such photoplay the exhibition hereunder of which has been so delayed or prevented, by sending after the expiration of such three (3) months' period to the other party notice in writing to such effect. **Delay in or Prevention of Performance**

In case the Distributor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity, Court orders, censor rulings, delays of any common carrier, or of the United States Postal authorities, delays in production or failure of the producers of any of such photoplays to make or deliver them to the Distributor or of any star or other performer to appear therein in time for delivery as herein provided, then such delay in or prevention of performance shall be excused and all claims or causes of action for damages therefor or arising therefrom are hereby expressly waived by the Exhibitor. In any such event, the time of the Distributor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, provided, however, that in case any such delay or prevention shall prevent the Distributor from "generally releasing" any such photoplay during the period specified in paragraph (b) of Article Second, the provisions of such paragraph shall govern, unless performance because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Distributor with respect to any such photoplay shall be waived. The resumption of performance by the Distributor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance and the Distributor shall deliver to the Exhibitor any such photoplay at the earliest available date thereafter, and such delivery in any such case shall be with the same force and effect as though delivery took place within the period herein above limited and the Exhibitor agrees to accept, pay for and exhibit any such photoplay at such later period pursuant to the terms hereof.

SEVENTEENTH: The waiver by either party of any breach or default by the other party shall not be construed as a waiver of any other or subsequent breach or default by such other party. **Waiver**

EIGHTEENTH: The parties hereto agree that before either of them shall resort to any court to determine, enforce or protect the legal rights of either hereunder, each shall submit to the Board of Arbitration (established or constituted pursuant to the Rules of Arbitration filed with the American Arbitration Association, 347 Madison Avenue, New York City, bearing date May 1, 1928, and identified by the signatures of the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference, a copy of which will be furnished to the Exhibitor upon request) in the city wherein is situated the exchange of the Distributor from which the Exhibitor is served or if there be no such Board of Arbitration in such city then to the Board of Arbitration in the city nearest thereto (unless the parties hereto agree in writing that such submission shall be made to a Board of Arbitration located in another specified city) all claims and controversies arising hereunder for determination pursuant to the said Rules of Arbitration and the rules of procedure and practice adopted by such Board of Arbitration. **Arbitration**

The parties hereto further agree to abide by and forthwith comply with any decision and award of such Board of Arbitration in any such arbitration proceeding, and agree and consent that any such decision or award shall be enforceable in or by any court of competent jurisdiction pursuant to the laws of such jurisdiction now or hereafter in force; and each party hereto hereby waives the right of trial by jury upon any issue arising under this contract, and agrees to accept as conclusive the findings of fact made by any such Board of Arbitration, and consents to the introduction of such findings in evidence in any judicial proceeding.

In the event that the Exhibitor shall fail or refuse to consent to submit to arbitration any claim or controversy arising under this or any other Standard Exhibition Contract which the Exhibitor may have with the Distributor or any other distributor or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, the Distributor may, at its option, demand, for its protection and as security for the performance by the Exhibitor of this and all other existing contracts between the parties hereto, payment by the Exhibitor of an additional sum not exceeding $500 under each existing contract, such sum to be retained by the Distributor until the complete performance of all such contracts and then applied, at the option of the Distributor, against any sums finally due or against any damages determined by said Board of Arbitration to be due to the Distributor, the balance, if any, to be returned to the Exhibitor; and in the event of the Exhibitor's failure to pay such additional sum within seven (7) days after demand, the Distributor may by written notice to the Exhibitor suspend service hereunder until said sum shall be paid and/or terminate this contract.

In the event that the Distributor shall fail or refuse to consent to the submission to arbitration of any claim or controversy arising under this or any other Standard Exhibition Contract providing for arbitration which the Distributor may have with the Exhibitor, or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, within the number of days specified in Article Twenty-second opposite the name of the City in which such Board of Arbitration is located, the Exhibitor may at his option terminate this and any other existing contract between the Exhibitor and the Distributor by mailing notice by registered mail within two (2) weeks after such failure or refusal, and in addition, the Distributor shall not be entitled to redress from such Board of Arbitration upon any claim or claims against any exhibitor until the Distributor shall have complied with such decision, and in the meanwhile the provisions of the first paragraph of this Article Eighteenth shall not apply to any such claim or claims.

Any such termination by either party, however, shall be without prejudice to any other right or remedy which the party so terminating may have by reason of any such breach of contract by the other party.

The provisions of this contract relating to arbitration shall be construed according to the law of the State of New York.

NINETEENTH: *This contract is complete and no promises or representations have been made by either party to the other except as set forth herein.* **Verbal Promises Representation**

TWENTIETH: If the license herein granted shall apply to an entire group of feature photoplays offered by the Distributor to the Exhibitor at one time, and not otherwise, the Exhibitor shall have the right to exclude from this contract up to but not exceeding ten per cent of the total number of such photoplays, but only if the Exhibitor shall give the Distributor written notice to such effect at any time not later than fourteen (14) days before the date fixed for the exhibition of any such photoplay hereunder, and if at the same time the Exhibitor shall pay to the Distributor one-half of the license fee payable in respect of any such photoplay. In computing such ten per cent, fractions of less than one-half shall be disregarded. If any such photoplay shall, because of such exclusion, be thereafter licensed by the Distributor for the same run as that specified in this contract, for exhibition at another theatre where such excluded photoplay would not have been exhibited if not so excluded; then one-half of the license fee (up to but not exceeding the amount paid by the Exhibitor to the Distributor as a condition of so excluding such photoplay) received by the Distributor for such re-license, shall be credited to the Exhibitor by the Distributor. **Option to Exclude if Group Licensed**

If the license fee for any such photoplay so excluded is to be computed either in whole or in part upon a percentage of gross receipts of the Exhibitor's theatre, then for the purpose of computing such one-half of such license fee payable hereunder in respect of such photoplay, such gross receipts for each day that any such photoplay is licensed hereunder for exhibition thereat shall be deemed to be the average daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to such date of availability of such photoplay.

TWENTY-FIRST: If the Exhibitor shall claim that the exhibition at the theatre hereinafter specified of any photoplay licensed hereunder will be offensive to the public in the place where such theatre is located, because of racial or religious subject matter, and if the Exhibitor shall give written notice to the Distributor of such claim within a reasonable time prior to the date fixed for the exhibition thereof hereunder such claim shall be immediately submitted to the Board of Arbitration herein specified. If such Board of Arbitration shall specifically determine that the exhibition of such photoplay at such theatre will be offensive to said public because of racial or religious subject matter, then such photoplay shall be excepted from this contract, and not otherwise. The Distributor may exhibit or license the exhibition of any photoplay so excepted when and where desired by the Distributor free from all claims of the Exhibitor. **Racial or Religious Subject Matter**

If the Distributor shall be of the opinion that any photoplay licensed hereunder will be offensive because of racial or religious subject matter, to the public in the place where the Exhibitor's theatre is located, the Distributor shall have the right to except and exclude such photoplay from this contract, upon condition that such photoplay shall not thereafter be licensed for exhibition in such place unless such racial or religious subject matter is eliminated therefrom in which case such photoplay shall again be deemed licensed hereunder.

TWENTY-SECOND: This instrument shall be deemed an application for a license under copyright only and shall not become binding until accepted in writing without alteration or change by an officer of or any person duly authorized by the Distributor and notice of acceptance sent to the Exhibitor at herein provided. The deposit by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment on account of any sums payable hereunder or the delivery of a print of any of the photoplays or the furnishing of any advertising accessories shall not be deemed an acceptance hereof by the Distributor. **Acceptance of Application**

Unless notice of acceptance of this application by the Distributor is sent to the Exhibitor by mail or telegraph within the number of days after the date thereof hereinafter specified (immediately following the name of the city wherein is situated the exchange of the Distributor from which the Exhibitor is served, or if such city is not hereinafter named then within the number of days specified immediately following the city hereinafter named nearest thereto) said application shall be deemed withdrawn and the Distributor shall forthwith return any sums paid on account thereof by the Exhibitor. Albany 10; Atlanta 20; Boston 10; Buffalo 10; Charleston 15; Charlotte 10; Chicago 15; Cincinnati 20; Cleveland 15; Dallas 30; Denver 20; Des Moines 15; Detroit 15; Indianapolis 15; Jacksonville 15; Kansas City 15; Los Angeles 25; Little Rock 15; Louisville 15; Memphis 20; Milwaukee 15; Minneapolis 20; Northern New Jersey 7; Omaha 20; Philadelphia 10; Pittsburgh 14; Portland, Ore. 20; Salt Lake City 30; San Francisco 25; Seattle 30; Washington, D. C. 14; New Haven 10; New Orleans 15; New York City 7; Oklahoma City 30; Peoria 15; St. Louis 15;

This application and any application for other photoplays of the Distributor executed by the Exhibitor at the same time shall, for the purpose of this Article only, be deemed one application unless an agreement to the contrary contained in the Schedule is specifically signed by the Exhibitor.

A copy of this application, signed by the Exhibitor, shall be left with the Exhibitor at the time of signing, and in the event of acceptance thereof as above provided, a duplicate copy, signed by the Distributor, shall be forwarded to the Exhibitor.

DIRECTION TO SALESMEN: *While you have every right to trade among prospective customers to obtain the best offer possible for our product, after you have selected a particular exhibitor whose offer you believe to be the best obtainable and take a written application from such exhibitor, you are hereby directed to forward the application to the office of your company and make no further effort to sell the same service to any other exhibitor directly competing with such exhibitor until the application so forwarded has been duly rejected, accepted or withdrawn in accordance with its terms. A violation of this direction will subject you to discharge.*

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Form E 781-2M-4-29 Sup. Printed in U.S.A.

Page Two

BRANCH OFFICE COPY

PLAINTIFF'S EXHIBIT B

1081
4
#29872

WILLIAM FOX *presents*

FOUR

CLARK AND McCULLOUGH

Comedies
Series Record.

FOX FILM CORPORATION
Executive Offices:
850 TENTH AVENUE
NEW YORK, N. Y.

MOVIETONE COMEDIES

EXCHANGE Buffalo CONTRACT No. SALESMAN Jack Fogarty

This agreement dated Sept 6 - 1929 is made between the Distributor and A B Muller Theatre,
(referred to in this agreement as the "Exhibitor"), operating the Ref
located at No. Street, City (Town) of Machias Lake State of Wyo

SCHEDULE

PRODUCTION No.	Successive Days Run	Guaranteed License Fee	EXHIBITION DATES MONTH	EXHIBITION DATES DATES	DESCRIPTION
KNIGHTS OUT	2/3	10—			Two stage hands fall asleep and wake up in the days of King Arthur when they wore tin night-shirts.
✓ ALL STEAMED UP	2/3	10			A couple of Turkish bath attendants get into hot water with the doctor's wife which burns the doctor up.
✓ HIRED AND FIRED	2/3	10			The boys get jobs as butlers in a fashionable home and nearly wreck the place with their crazy antics.
DETECTIVES WANTED	2/3	10			Sherlock Holmes had nothing on these two gumshoes when it comes to finding the wrong clues.

Protection—Run

REMARKS

Warranty as to Form

License

Time and Place of Exhibition

Payment

Payment on Account

Protection and Run

Delivery and Return of Prints

Selection or Designation of Play Dates

Loss of and Damage to Prints

Description and Titles of Photoplays Released

Assignment Upon Sale of Theatre

Exhibition and Advertising

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Description and Titles of Photoplays Released

Assignment Upon Sale of Theatre

Exhibition and Advertising

Warranty as to Advertising

Taxes

Minimum Admission Charge

Delay in or Prevention of Performance

Waiver

Arbitration

Verbal Promises; Representation

Option to Exclude if Group Licensed

Racial or Religious Subject Matter

Protection—Run .....

.....

REMARKS

END OF SCHEDULE

IN WITNESS WHEREOF the Distributor above named and A B Muller the Exhibitor operating 6-7 days each week with 2-3 changes of program the Ref Theatre, located at ..... in Middle Fork State of Mont have executed this instrument, the 6th day of Sept 1929, which upon acceptance by the Distributor shall be deemed to be the license to the Exhibitor for the exhibition of the photoplays specified in the Schedule in accordance with the terms hereof.

EXHIBITOR: A B Muller

By .....

Salesman Jack Lowntz

FOX FILM CORPORATION

APPROVED .....

RIDER FOR SOUND PICTURES

This rider is in addition to and part of this Contract, which for convenience is printed before instead of attached hereto.

1. "Recorded Sound" as used herein shall be deemed to mean the spoken words, music, or other sounds recorded upon the positive print of a photoplay or upon a record, disc or other similar devices, separate and apart from a positive print, for use in synchronism therewith.

2. The Distributor grants to the Exhibitor and the latter accepts a license under the respective copyrights of the photoplays specified in the Schedule for which sound recorded and/or under any copyright which may be in force with respect to any musical composition in such recorded sound, to reproduce such recorded sound in synchronism with the exhibition of such photoplays, but only at the theatre designated in the license to which this Rider is attached, and for the number of consecutive days in the Schedule specified.

3. This license is on reproducers such recorded sound is granted upon the Exhibitor's warranties and conditions as follows: (a) that the sound reproducing equipment installed in said theatre will operate reliably and efficiently to reproduce such recorded sound, with adequate volume and high quality, whether recorded upon the positive print or upon records, discs or other similar devices, and (b) that if copyrighted musical compositions are included in such recorded sound, the Exhibitor shall, at the time of the exhibition of such photoplays and the reproduction of such recorded sound, have an effective license from the American Society of Authors, Composers and Publishers publicly to perform the copyrighted musical compositions in the repertoire of said Society.

4. The Exhibitor agrees: (a) to return all sound records, discs or other similar devices, if any have been delivered to Exhibitor hereunder, and all parts thereof if damaged or broken, immediately following the last exhibition of the photoplay with which such sound records are used; and (b) if such recorded sound is recorded on records, discs or other similar devices, to replace with blank blank positive work, all parts removed from the positive print of any photoplay while in the Exhibitor's possession, but the Exhibitor shall have no right to remove any part of the positive print except as specifically authorized in the license to which this Rider is attached.

5. All of the provisions of the license to which this Rider is attached shall be deemed incorporated herein as if fully set forth, except that for the purposes of this Rider only, there shall be substituted for the words "photoplays" and "positive prints" the words "records, discs or other similar devices" (if any are produced and delivered), and there shall be substituted for the words "exhibition" and "exhibit" the words "reproduction" and "reproduce" where the context permits; and it is agreed that all claims and controversies arising hereunder shall be submitted for determination by arbitration, as provided in Article EIGHTEENTH of the said license.

6. The Distributor does not warrant that such recorded sound will be recorded on the positive print or on records, discs or other similar devices, the Distributor reserving the right to use any one or more methods of recording it may from time to time determine.

The Exhibitor agrees to effect actual playing of the Clark and McCullough Movietone Comedies under this contract not later than ..... 12/28/30 .....

..... to be played and/or paid for at the rate of not less than Same

FOX FILM CORPORATION

Taxes

Minimum Admission Charge

Delay in or Prevention of Performance

Waiver

Arbitration

Verbal Promises; Representations

Option to Exclude if Group Licensed

Racial or Religious Subject Matter

Acceptance of Application

END OF SCHEDULE

IN WITNESS WHEREOF the Distributor above named and A B Muller the Exhibitor operating 6-7 days each week with 2-3 changes of program the Ref Theatre, located at in Middle Falls State of Mynn have executed this instrument, the 6th day of Sept 1929, which upon acceptance by the Distributor shall be deemed to be the license to the Exhibitor for the exhibition of the photoplays specified in the Schedule in accordance with the terms hereof.

EXHIBITOR: A B. Muller

FOX FILM CORPORATION

By

Salesman Jack Lowitz

APPROVED

RIDER FOR SOUND PICTURES

This rider is in addition to and part of this Contract, which for convenience is printed before instead of attached hereto.

1. "Recorded Sound" as used herein shall be deemed to mean the spoken words, music, or other sounds recorded upon the positive print of a photoplay or upon a record, disc or other similar devices, separate and apart from a positive print, for use in synchronism therewith.

2. The Distributor grants to the Exhibitor and the latter accepts a license under the respective copyrights of the photoplays specified in the Schedule for which sound is recorded and/or under any copyright which may be in force with respect to any matter included in such recorded sound, to reproduce such recorded sound in synchronism with the exhibition of such photoplays, but only at the theatre designated in the license to which this Rider is attached, and for the number of consecutive days in the schedule specified.

3. This license to so reproduce such recorded sound is granted upon the Exhibitor's warranties and conditions as follows: (a) that the sound reproducing equipment installed in said theatre will operate reliably and efficiently to reproduce such recorded sound, with adequate volume and high quality, whether recorded upon the positive print or upon records, discs or other similar devices, and (b) that if copyrighted musical compositions are included in such recorded sound, the Exhibitor shall, at the time of the exhibition of such photoplays and the reproduction of such recorded sound, have an effective license from the American Society of Authors, Composers and Publishers publicly to perform the copyrighted musical compositions in the repertoire of said Society.

4. The Exhibitor agrees: (a) to return all sound records, discs or other similar devices, if any have been delivered to Exhibitor hereunder, and all parts thereof if damaged or broken, immediately following the last exhibition of the photoplay with which such sound records are used; and (b) if such recorded sound is recorded on records, discs or other similar devices, to replace with blank positive stock, all parts removed from the positive print of any photoplay while in the Exhibitor's possession, but the Exhibitor shall have no right to remove any part of the positive print except as specifically authorized in the license to which this Rider is attached.

5. All of the provisions of the license to which this Rider is attached shall be deemed incorporated herein as if fully set forth, except that for the purposes of this Rider only, there shall be substituted for the words "photoplays" and "positive prints" the words "records, discs or other similar devices" (if any are produced and delivered), and there shall be substituted for the words "exhibition" and "exhibit" the words "reproduction", and "reproduce" where the context permits; and it is agreed that all claims and controversies arising hereunder shall be submitted for determination by arbitration, as provided in Article EIGHTEENTH of the said license.

6. The Distributor does not warrant that such recorded sound will be recorded on the positive print or on records, discs or other similar devices, the Distributor reserving the right to use any one or more methods of recording it may from time to time determine.

The Exhibitor agrees to start actual playing of the Clark and McCullough Movietone Comedies under this contract, not later than 2/28/30

; to be played and/or paid for at the rate of not less than [illegible] per month

IN WITNESS WHEREOF, the parties hereto have duly executed this Rider.

A B. Muller
EXHIBITOR

FOX FILM CORPORATION

APPROVED

76

No. 152 Loring, J.

HENNEPIN COUNTY 229

FOX FILM CORPORATION,

Appellant,

29872 vs.

A. B. MULLER,

Respondent.

Endorsed:
Filed June 29, 1934
Grace Kaercher Davis, Clerk
Minn. Supreme Court. 230

SYLLABUS

1. The standard motion picture exhibition contract here involved contains an arbitration clause whose illegality as against public policy as announced by the Sherman Anti-Trust Act, permeates and vitiates the whole contract.

2. Under the doctrine of Connecticut Wallpaper Co. v. Voight, 212 U. S. 227, the courts will not enforce any of the provisions of such a contract or aid in recovery for goods delivered thereunder but will leave the parties where they find themselves.

Affirmed. 231

OPINION

LORING, *Justice.*

Appeal from an order denying plaintiff's motion for a new trial.

This action was brought to recover damages for breach of two contracts entered into between plaintiff and defendant whereby plaintiff leased numerous moving picture films to defendant, the total agreed rental for which was $1345 plus $460 for the synchronized scores. On the first nine pictures contracted for plaintiff was to have 50% of the gross admission receipts in excess of $200 which it alleges would have aggregated $225 under the liquidated

damage provision of the contract. It asserts damage in
232 the total contract price of the rental of the films and scores plus the $225 item. The defendant relies upon the total illegality of the leasing contracts as in restraint of trade and in violation of the Federal anti-trust act as determined in the United States v. Paramount, 34 F. (2d) 984, affirmed in 282 U. S. 30, 51 S. Ct. 42, 75 L. ed. 145. It is the custom in the moving picture trade for the distributors of the films to enter into contracts with exhibitors prior to the making of the pictures and on dates specified in the contract the pictures are sent to the exhibitor. It is essential that the prints of the film be kept constantly moving from one exhibitor to another since the life of the public demand for a picture is short and any
233 delay is costly to the producer and distributor. The contracts here in question were formulated and imposed by the producers and distributors upon the exhibitors in the same manner as those involved in the cases cited above.

Pursuant to the contracts here in question plaintiff sent five films to the defendant at his request, who refused to accept, exhibit or pay for them. As a consequence the pictures were not exhibited during the time they were in transit to and from the defendant.

It appears that substantially all of the moving picture producers and distributors have organized for the distribution of moving picture films and for the purpose of such
234 distribution have set up in certain districts throughout the United States many unincorporated associations known as Film Boards of Trade. The history of these organizations and their coercive methods of imposing their standard contract upon exhibitors is all fully set out in the opinions above referred to. It would serve no useful purpose to reiterate it here. It is sufficient to say that the producers and distributors have formulated and agreed to adopt a Standard Exhibition Contract for the use of the trade; that no exhibitor could, at the time these contracts were made, obtain pictures unless he agreed to the standard contract; that the contract then contained an arbitration clause which the supreme court has held to unreasonably

restrain competition and to be in violation of the anti-trust act. 235

The arbitration clause provided that before any action should be brought on the contract, any claims arising thereunder should be submitted to an arbitration board; that the parties would be bound by the decision of the arbitration board; that in the event the exhibitor should fail or refuse to submit any claim under the contract to the arbitration board the distributor might require a bond in a sum not exceeding $500 to be posted by the exhibitor for faithful performance of that contract, or at his option the distributor might terminate the contract or any existing contract between the distributor and the exhibitor. Like bonds to, or termination by, all other distributors followed a claimed breach with any one distributor. 236 The contract expressly provided that unless the exhibitor observed the illegal arbitration clause the distributor should not be bound by any of it and might terminate it.

The question presented on this appeal is whether the arbitration clause is severable from the contract, leaving the remainder of the contract enforceable, or not severable, permeating and tainting the whole contract with illegality and making it void.

1. Many cases involving the standard exhibition contract have been before the courts in which the same question has been presented. A careful examination of these 237 cases finds the courts about equally divided upon the question of severability or non-severability of the arbitration clause. Although not all the cases were actions for breach of the contract, the rule has been laid down in the following cases that only the arbitration clause is illegal and that it is severable from the balance of the contract and that the valid remainder of the contract is enforceable. Columbia Pictures Co. v. Bi-Metallic Co., 42 F. (2d) 873; Paramount etc. Co. v. National Theater, 49 F. (2d) 64; Metro-Goldwyn Co. v. Bijou Theater, 50 F. (2d) 908; Fox Film Co. v. Buchanan, 17 La. App. 285, 136 So. 197; Metro-Goldwyn Co. v. Cocke, 56 S. W. (2d) 489 (Tex.); Fox Film Co. v. Ogden Theater, 17 P. (2d) 294 (Utah).

The case of Metro-Goldwyn Co. v. Bijou Theater, although
238 criticizing the rule laid down in Paramount etc. Co. v. National Theater, followed the holding there handed down. On the other hand, the following cases have held that the illegal arbitration clause taints the whole contract with illegality. Vitagraph Co. v. Theater Realty Co., 50 F. (2d) 907; Fox Film Co. v. Amusement Co., 58 F. (2d) 337; Universal Film Co. v. West, 163 Miss. 272, 141 So. 292; Majestic Theater v. United Artists, 43 F. (2d) 990; United Artists v. Odeon Building, Inc., 212 Wis. 150, 248 N. W. 784; Fox Film Co. v. Tri-State Theaters, 51 Idaho 439, 6 P. (2d) 135.

Most of this confusion has been occasioned by the dif-
239 ferent interpretations placed upon Judge Thatcher's opinion and decree in the case of United States v. Paramount, 34 F. (2d) 984, and the affirming opinion in 282 U. S. 30, 51 S. Ct. 42, 75 L. ed. 145. The language of the decree most often quoted in support of the first proposition follows:

> "Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree."

240 The action in that case was brought by the United States for the purpose of restraining the defendants from further engaging in a conspiracy in restraint of interstate commerce in motion picture films in violation of the Sherman Anti-Trust Act, 15 U. S. C. A., §1. The petition of the government alleged that the defendant Film Boards of Trade (of which this plaintiff is a member) controlled the distribution of 98% of all moving picture films in the United States; that the said defendants conspired to coerce and require every exhibitor to submit to arbitration all disputes *by means* of adopting for use in dealing with exhibitors a Standard Exhibition Contract. The decree in that case uses the following language:

"That the defendants, * * * hereby are perpetually enjoined, restrained and prohibited, individually and collectively: 241

3. *From entering into any agreement embodying* provisions of paragraph 'Eighteenth' (the arbitration clause here under consideration) of said 'Standard Exhibition Contract' dated May 1, 1928 * * *." (Italics ours.)

As we interpret this language it declares not only the arbitration clause illegal but the whole of the contract. By the decree, entrance into any agreement *containing* the illegal clause is prohibited. It would therefore seem that Judge Thatcher intended the decree to hold the entire contract tainted with illegality. This intention is given added strength by the language of the opinion. 242

"By agreement of these distributors, exhibitors who were not represented in the adoption of the uniform contracts have been constrained to accept their terms regardless of their wishes, and by the compulsory system of arbitration, sanctioned and enforced by the collective action of the distributors, have been constrained to perform the *contractual obligations* thus assumed. In fairness it cannot be said that the restraint imposed upon these exhibitors is voluntary because they accept and agree to be bound by the *contracts*. They can have none other, because the defendants have agreed that they shall not; and, unless something more than the mere acceptance of all they can get is shown, they 243 must be said to have acted under an involuntary restraint, imposed and continued by the defendants to the end that the contracts shall be signed and their terms obeyed. That such coercive restraint upon the commercial freedom of an exhibitor who was neither represented nor consulted with reference to the agreement to adopt the *standard form of contract,* is undue and unreasonable, both at common law and under the Sherman Act, I cannot doubt." (Italics ours.)

We accordingly construe Judge Thatcher's opinion and decree as holding that the entire contract was illegal. United Artists v. Odeon Bldg., 212 Wis. 150, 248 N. W.

784. The opinion in that case carefully reviews all the
244 principal decisions and comes to the conclusion that the whole contract is tainted by the illegal arbitration clause. This view of the law seems to be sound. The exhibitor was forced to enter the contract with the invalid arbitration clause in it if he was to receive any moving picture films. Should he fail to comply with the arbitration clause he was forced by its terms to post a bond for the benefit of the distributor and his refusal to do so gave the distributor the option of cancelling and terminating the contract. The same option was given the distributor should the exhibitor refuse to submit to arbitration. All his contracts with other distributors would be cancelled
245 and he would be forced out of business with penalties to pay. The arbitration feature of the contract was the strongest kind of coercion. In practice it must have compelled performance according to the views of the distributors. It more than discouraged competition and must necessarily have been a major consideration for the contract. Without it the rights of the parties are substantially changed and it is evident that an exhibitor could accept the contract with this clause or fail to get any pictures. As said in the Wisconsin case: "its inclusion so influenced the making of the contract as to render its separation from the legal portion of the contract improper." In Universal Film Exchanges v. West, 163 Miss. 272, 141
246 So. 293, the court said:

> "In other words, the contract expressly provides that, unless the exhibitor shall be bound by and shall observe the illegal portion of the agreement, the distributor shall not be bound by any of the said contract, but may wholly terminate it. Therefore the illegal portion inseparably and vitally connects itself with all the other parts, and, in consequence, the illegal portion infects the entire contract with illegality."

The Wisconsin supreme court said of this Standard Exhibition Contract:

> "It appears to us that the weight of authority, as well as sound reason, supports the conclusions,

first, that the arbitration clause is unquestionably illegal; and, second, that its inclusion so influenced 247
the making of the contract as to render its separation from the legal portion of the contract improper. The fight made to sustain the arbitration clause in the litigation which culminated in Paramount Famous Lasky Corporation v. United States, supra, would seem to indicate its great importance to the combination plan. The arbitration clause provides that in the event that the exhibitor shall fail or refuse to submit to arbitration, the distributor may, at its option, demand security for its protection and, upon failure to comply with such demand, may suspend service or terminate the contract. It seems clear, from these provisions, that the arbitration plan embodied in the contract is so closely connected and tied into the remainder of the contract 248
that it must be said that the illegality permeates the whole contract."

2. The plaintiff insists that notwithstanding the illegality of the contract it is entitled to recover for the reasonable value of the rental of those films requested by the defendant but not used. The trial court took the position that the doctrine of Continental Wallpaper Co. v. Voight, 212 U. S. 227, applied and the whole contract being illegal on the ground of public policy, no rights thereunder could be enforced by the courts although defendant may have received something under the contract. We are in accord with the trial court. There is a further reason why plaintiff may not recover on a quantum meruit for these films. 249
There is no evidence whatever in the record of their reasonable rental value and we will not resort to the contract, illegal as against public policy, for evidence. Both plaintiff's causes of action are based upon the illegal contracts. There can be no recovery even of the transportation charges. They were incurred in furtherance of those contracts. The courts will leave the parties where they find themselves. Continental Wallpaper Co. v. Voight, supra.

Order affirmed.

#29872

250

STATE OF MINNESOTA

IN SUPREME COURT

FOX FILM CORPORATION,

Appellant,

vs.

A. B. MULLER,

Respondent.

---

251 APPLICATION FOR REARGUMENT.

Now comes above Appellant and respectfully petitions this Honorable Court to grant a reargument of said cause, and states and urges upon the Court the following grounds therefor.

THE BASIC FACTS.

The Standard Exhibition Contracts on which these causes of action were based were both dated September 6, 1929. The action begun November 3, 1930. The decision of the lower court October 26, 1933. The Thacher decision was made October 15, 1929; affirmed by the
252 Supreme Court November 24, 1930. When the Thacher decision and decree were rendered, arbitration as a remedy in the Standard Exhibition Contracts was declared illegal. Affirmed by United States Supreme Court November 30, 1930.

An *illegal* consideration is *no* consideration. As a remedy it disappeared from all Standard Exhibition Contracts containing it, so far as a *consideration*, as well as a *remedy* are concerned, leaving as consideration for the contracts, a promise for a promise, and for the remedy, the courts. It was with these considerations in mind, that plaintiff inserted in the Record (p. 23, Stipulation of Fact) the following:

"Admitted that since said decisions were made, arbitration under the terms of said paragraph 18 253
has been discontinued by plaintiff, and all machinery and methods and rules for arbitration of legal rights and disputes of the parties under said contracts, have been abolished by plaintiff and the other Film Companies, defendants in said action, and plaintiff in this case makes no claim, and claims no rights under said paragraph 18 of said contracts."

The purpose and result of which was to show, in connection with what is said above, a practical *deletion* of the illegal clauses from the contracts. (Pursuant to the behest of the Thacher decision.)

254

First Point then is that the Court in the decision must have overlooked the Stipulation of Fact, especially the paragraph above quoted. We do not claim that defendant in so stipulating, agreed to our construction thereof. But what other purpose could that language have or mean?

Second Point. The court must have overlooked the effect of paragraph III of the decree in the Paramount case, quoted in the opinion, because there was no holding as to its effect. Necessarily, with the present holding, it would have to be regarded as *surplusage*.

Third Point. The court has fallen into manifest error 255
in applying to this case the doctrine announced in the case of Continental Wall Paper v. Voight, since there is not a syllable of evidence in the Stipulation of Fact or the record upon which to base that doctrine, or apply it to this case. We may add that by the *per curiam* opinion in the case of United Artists v. Miller, decided at the same time as the Fox case, the court has applied the above doctrine to that case, notwithstanding that it was not even raised by the defendant in his brief or argument and does not appear anywhere in the record, and of course there is not a scintilla of evidence to support it as applied to that case.

FOURTH POINT. The court held (page 6 of decision)
256 that plaintiff was not entitled to recover for the four pictures shipped defendant at his special request, nor the carriage charges both ways, $8.92, especially because there was no evidence of value, and resort could not be had to an illegal contract for value.

(a) In this the court must have overlooked the statement in paragraph 4 of the complaint, admitted by the stipulation of fact, that *these* four pictures were *specially* ordered by defendant. Unlike the others, there could be and was no coercion. He did not follow the usual course of having them pressed upon him *under the* contract. No *written* contract was there involved; merely a verbal re-
257 quest. No recourse to the written contract necessary.

(b) As to reasonable value, if the stated value in the contract could not be used, surely the plaintiff was entitled to *nominal damages* for each picture. In any event to the cost of carriage, $8.92.

(c) The court applied the doctrine of Continental Wall Paper case to this point. There is no evidence to support it whatsoever.

FIFTH POINT. There were so many points made in our brief as to which no notice was taken in the court's opinion, that it seems as if they must have been overlooked
258 among them these, viz.:

1. That an action at *law on the contract after* an illegal part had been struck down and out of the contract in *equity,* brings a different situation to a court than was before the Federal Court in equity. The law court having acquiesced in the equity decision and "put its house in order" accordingly. See paragraph, Stipulation of Fact.

2. That unincorporated body of exhibitors are not individually bound by a committee thereof, unless the individual appoints the committee or ratifies its action.

3. That courts usually hold arbitration provisions (a

SIXTH POINT. The great public interests are involved, thousands of such contracts, this office has seven or eight awaiting final decision here, and there is strong reason to believe, and additional reasons could be urged, that the court has erred in its decision.

FEDERAL QUESTIONS.

1. Misconstruction of the Sherman Anti-Trust Act, in giving to it a more deadly power than any other prohibitory act.

2. Misconstruction of a Federal decree (Thacher case).

3. The court's conclusions of law as to a Federal right and the court's findings of fact are intermingled, so that the facts should be analyzed more clearly.

Respectfully submitted,

SHEARER, BYARD & TROGNER

(Endorsed)
Filed July 9, 1934
Grace Kaercher Davis, Clerk

STATE OF MINNESOTA

262 OFFICE OF CLERK OF SUPREME COURT

St. Paul, Minn.

Aug. 1, 1934

FOX FILM CORPORATION,
Appellant,

29872 vs.

A. B. MULLER,
Respondent.

---

263 *Sir:*

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

GRACE KAERCHER DAVIS,
Clerk Supreme Court.

264

TRANSCRIPT OF JUDGMENT

265

STATE OF MINNESOTA

SUPREME COURT

FOX FILM CORPORATION,

Appellant,

29872

vs.

A. H. MILLER,

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin, be and the same hereby is in all things affirmed. 266

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein, the sum and amount of Fifty-four and 25/100 Dollars ($54.25), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed: Aug. 2, 1934. 267

BY THE COURT.

Attest:

GRACE KAERCHER D' 'S,

Clerk.

STATEMENT FOR JUDGMENT

Statutory Costs $25.00 Printer $29.25 Total $54.25

STATE OF MINNESOTA.

268

IN SUPREME COURT

I, GRACE KAERCHER DAVIS, Clerk of said Court, do hereby certify that the foregoing pages, numbered from 1 to 89, inclusive, are a true, full and complete transcript of the record and proceedings in the case of

FOX FILM CORPORATION,
Appellant,

29872 vs.

269

A. B. MILLER,
Respondent,

and also of the opinion of the court rendered therein, as the same now appear on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at my office, in the city of Saint Paul, Minnesota, this 11th day of October, 1934.

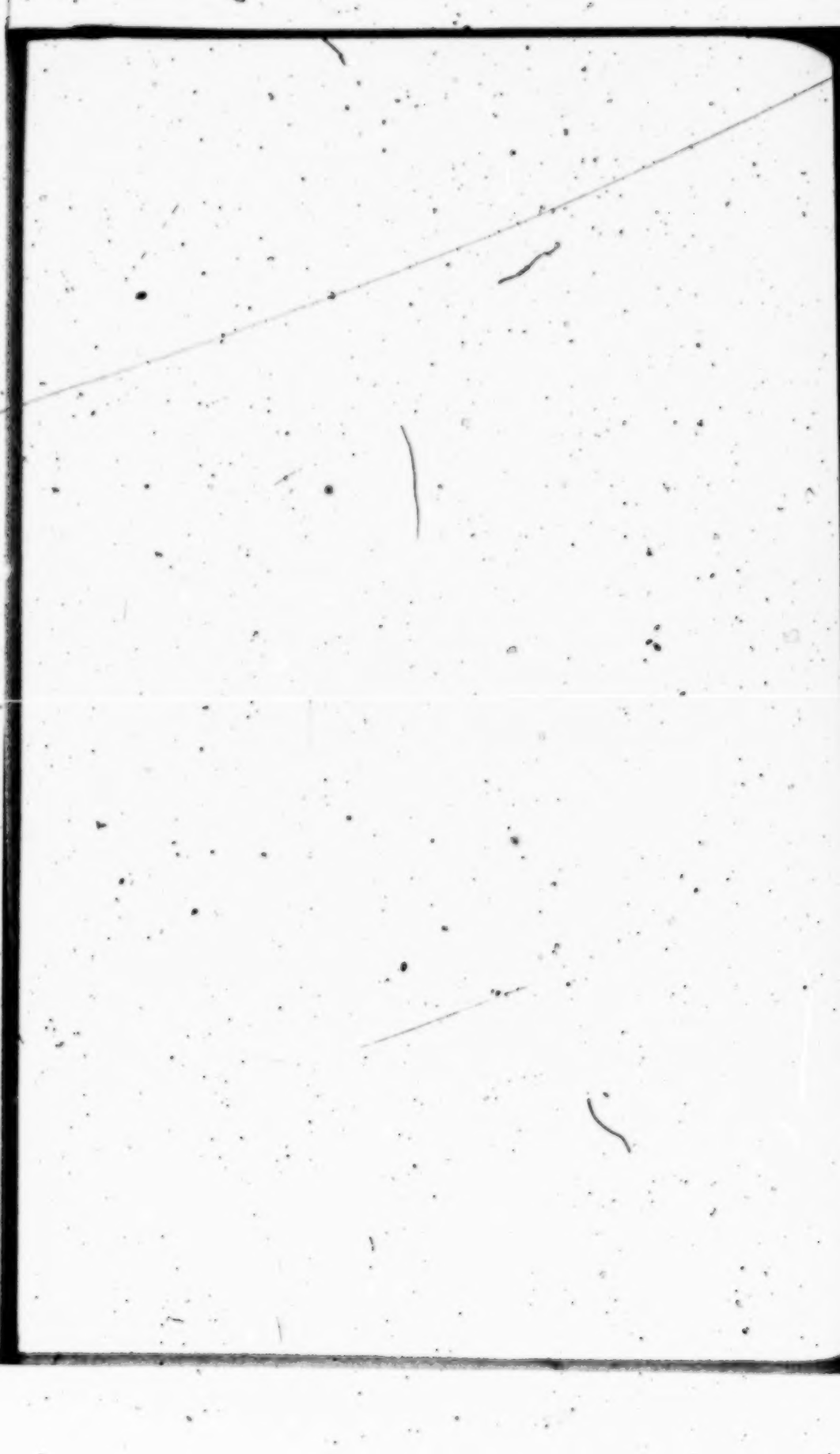
GRACE KAERCHER DAVIS,
Clerk of Supreme Court of Minnesota,
(Seal) By MAE SHERMAN, Deputy.

270

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



MANDATE

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

WHEREAS, lately in the Supreme Court of the State of Minnesota before you, or some of you, in a cause between Fox Film Corporation, Appellant, and A. B. Muller, Respondent, No. 29872, wherein the judgment of the said Supreme Court, entered in said cause on the 2nd day of August, A. D. 1934, was in favor of the said respondent, A. B. Muller, and against the said appellant; as by the inspection of the transcript of the record of said Supreme Court, which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari agreeably to the act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-four, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered by this Court that the writ of certiorari in this cause be, and the same is hereby, dismissed as improvidently granted.

February 18, 1935.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of Minnesota, in order that such proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as according to right and justice, and the Constitution and laws of the United States, ought

to be had therein, the said writ of certiorari notwithstanding.

Witness the Honorable CHARLES E. HUGHES, Chief Justice of the United States, the seventh day of March, in the year of our Lord one thousand nine hundred and thirty-five.

CHARLES ELMORE CROPLEY
Clerk of the Supreme Court
of the United States.

Supreme Court
Filed Mar. 11, 1935
Russell O. Gunderson, Clerk.

MANDATE

STATE OF MINNESOTA }
SUPREME COURT } ss.:

THE STATE OF MINNESOTA

To the Honorable Judge and Officers of the District Court within and for the County of Hennepin Greeting:

WHEREAS, Lately in your Court, in an action therein pending, entitled Fox Film Corporation, Plaintiff and A. B. Muller, Defendant a certain order was entered therein October 26, 1933 from which action of your Court an appeal thereafter was taken to this Court;

AND WHEREAS, The said cause came on to be heard before our Supreme Court, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed, and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

NOW THEREFORE, This MANDATE is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith REMANDED to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

WITNESS, The Honorable JOHN P. DEVANEY, Chief Justice of the Supreme Court aforesaid, and the (Seal) seal of said Court at St. Paul, this Mar. 13, 1935.

RUSSELL O. GUNDERSON
Clerk of the Supreme Court.
By MAE SHERMAN
Deputy.

STATE OF MINNESOTA,

SUPREME COURT

FOX FILM CORPORATION,
Appellant,

vs.

A. B. MULLER,
Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein, the

sum and amount of Fifty-four and 25/100 Dollars, ($54.25) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Aug. 2, 1934.

BY THE COURT.

Attest:

GRACE KAERCHER DAVIS
Clerk.

STATEMENT FOR JUDGMENT

Statutory Costs $25.00 Printer $29.25 Total $54.25

314886

STATE OF MINNESOTA — DISTRICT COURT

County of Hennepin — Fourth Judicial District.

FOX FILM CORPORATION,
Plaintiff,

vs.

A. B. MULLER,
Defendant.

JUDGMENT AND DECREE

March 19, 1935.

The above entitled action having been regularly placed upon the calendar of the above named court for the September A. D. 1932 General Term thereof, came on for trial before the court on the 30th day of January, A. D. 1933;

and the court, after hearing the evidence adduced at said trial and being fully advised in the premises, did on the 7th day of April, A. D. 1933 duly make and file its findings and order for judgment herein; and thereafter, to-wit: on June 19th, 1933, the court made and filed certain additional and amended findings of facts, which with findings IV to XIV inclusive as originally drawn and filed April 7, 1933, constituted the Findings in the case upon which said order for judgment was based.

Now, pursuant to said order, and on motion of Samuel P. Halpern, Esquire, attorney for defendant, it is hereby adjudged and decreed:

1. That each and all of the contracts set out in plaintiff's complaint are null and void and illegal, and in violation of the Sherman Anti-Trust Act; that plaintiff is not entitled to recover the amounts demanded in the complaint, or any part thereof.

2. That the defendant is entitled to have said causes of action dismissed, and the above entitled action is hereby dismissed; and that defendant have and recover of plaintiff the sum of Thirteen ($13.00) Dollars, costs and disbursements as taxed and allowed herein.

BY THE COURT:

GEO. H. HEMPERLEY,
Clerk of District Court.
By W. A. CARLSON,
Deputy.

(Seal District Court)

#314,886

STATE OF MINNESOTA — DISTRICT COURT

County of Hennepin — Fourth Judicial District.

FOX FILM CORPORATION,

Plaintiff,

vs.

A. B. MULLER,

Defendant.

NOTICE OF APPEAL TO SUPREME COURT.

To A. B. MULLER, said defendant and To SAMUEL P. HALPERN, Attorney for the above named defendant, and to GEORGE H. HEMPERLEY, Clerk of said District Court:

PLEASE TAKE NOTICE, That the above named plaintiff, Fox Film Corporation appeals to the Supreme Court of the State of Minnesota, from that certain judgment and decree of the said District Court entered herein on the 19th day of March, A. D. 1935, and from the whole thereof.

Dated 25th day of March, A. D. 1935.

SHEARER, BYARD & TROGNER,
Attorneys for plaintiff,
654 Security Building,
Minneapolis, Minnesota.

Due service of within Notice of Appeal is hereby admitted at Minneapolis, Minn. this 25th day of March, 1935.

S. P. HALPERN
Attorney for Defendant

GEO. H. HEMPERLEY
Clerk of District Court.

Filed Apr. 5, 1935
Russell O. Gunderson, Clerk.

DISTRICT COURT,

FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA, }
COUNTY OF HENNEPIN } ss.:

FOX FILM CORPORATION, a corporation,
Plaintiff,

vs.

A. B. MULLER,
Defendant.

KNOW ALL MEN BY THESE PRESENTS, That we Fox Film Corporation, a corporation organized under the laws of the State of New York, and admitted to do business in the State of Minnesota as principal, and National Surety Corporation, as surety, are held and firmly bound unto A. B. Muller, defendant above named, in the sum of Three Hundred Fifty ($350.00) Dollars, lawful money of the United States, to be paid unto the said defendant, his heirs, executors, administrators or assigns, for which payment well and truly to be made, we jointly and severally bind ourselves, and each of our heirs, executors and administrators, and successors firmly by these presents.

Sealed with our seals and dated this 29th day of March, 1935.

The condition of this obligation is such, that whereas the said plaintiff has appealed to the Supreme Court of the State of Minnesota, from a certain judgment of said court given, rendered and entered in said above action in said Court on March 19, 1935, in favor of said defendant and against said plaintiff,

NOW, THEREFORE, If the appellant shall pay all costs and charges which may be awarded against it on this ap-

peal, and shall also pay that certain judgment for costs in the amount of $54.25 rendered against plaintiff on the former appeal to said court, and if the judgment appealed from or any part thereof is affirmed the appellant will pay the amount directed to be paid by the judgment, and if affirmed in part only, that part as to which it is affirmed, and all damages awarded against appellant on the appeal, not exceeding in the aggregate the penalty of this bond, then this obligation shall be void, otherwise to remain in full force.

IN TESTIMONY WHEREOF, We have hereunto set our hands and seals this 29th day of March, A. D. 1935.

FOX FILM CORPORATION, (Seal)
By JAMES D. SHEARER
Its attorney and agent.

NATIONAL SURETY CORPORATION (Seal)
By H. E. BERREAU
Attorney-in-fact.

Signed, Sealed and Delivered in Presence of

PATRANELLA E. TOUW.
OLGA C. OLIVER
J. N. HUGHES
R. P. RENIKE

STATE OF MINNESOTA, }
COUNTY OF HENNEPIN } ss.:

On this 29th day of March, A. D. 1935, before me, a Notary Public, within and for said County, personally appeared JAMES D. SHEARER, one of the attorneys and agent for Fox Film Corporation, the plaintiff and obligor in said bond, to me known to be the person described in and who executed the foregoing instrument as agent for and on be-

half of said obligor, and acknowledged that he executed the same as his free act and deed and as the free act and deed of said Fox Film Corporation.

PATRANELLA E. TOUW
Notary Public, Hennepin County, Minn.
My commission expires Aug. 3, 1938.
(Seal)

STATE OF MINNESOTA }
COUNTY OF HENNEPIN } ss.:

On this 29th day of March A. D. 1935 before me appeared H. E. BERREAU to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Corporation the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said H. E. BERREAU acknowledged said instrument to be the free act and deed of said corporation.

JAMES N. HUGHES
Notary Public, Hennepin County, Minn.
My Commission Expires Oct. 24, 1941.
(Notarial Seal)

314886

Copy

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

COUNTY OF HENNEPIN

FOX FILM CORPORATION
Plaintiff

—vs—

A. B. MULLER,
Defendant.

BOND IN APPEAL, SUPREME COURT

I hereby approve the within Bond and Sureties therein contained this 29th day of March, 1935.

P. W. GUILFORD
Judge District Court.

233½

Due service of within Bond by copy admitted this 29th day of March, 1935.

S. P. HALPERN
Atty. for Deft.

File No. 30485

STATE OF MINNESOTA

IN SUPREME COURT

FOX FILM CORPORATION,
Plaintiff-Appellant,

vs.

A. B. MULLER,
Defendant-Respondent.

STIPULATION.

IT IS HEREBY STIPULATED that the appeal now pending from a final judgment and decree of the District Court of the Fourth Judicial District, Hennepin County, State of Minnesota, duly entered on March 19, 1935, in the above entitled action, in favor of the defendant, dismissing the said action and decreeing that the contracts set out in plaintiff's complaint are void and illegal in violation of the Sherman Anti-Trust Act, may be and is hereby submitted to the Supreme Court of Minnesota for its decision, without further argument, upon the printed record, briefs of the parties, and all other proceedings had or taken in a former appeal by the plaintiff in this same cause to this Court from an order denying a motion for a new trial dated October 26, 1933, and which appeal is known as number 29872 on the records of this Court, and which order denying said motion for a new trial was duly affirmed by this Court by order of affirmance entered August 2, 1934. And in the event said judgment and decree of said District Court be affirmed by this Court, no further remittitur be sent to said District Court, it being the purpose of this stipulation that any such judgment of affirmance may be entered as a final judgment of this

Court for the purpose of the plaintiff, if it so elects, presenting a petition for a Writ of Certiorari to the United States Supreme Court to review such final judgment of this Court.

It is further stipulated that nothing herein shall be construed as a consent by plaintiff to the entry of any judgment against it, or as a waiver of any of its assignments of errors in the entry of any such judgment; plaintiff expressly reserving and claiming the right to have all questions arising on the entry of said final judgment and proceedings prior thereto, reviewed by the United States Supreme Court.

Dated: April 6, 1935.

SHEARER, BYARD & TROGNER
Attorneys for Plaintiff

S. P. HALPERN
Attorney for Defendant.

Filed Apl. 8, 1935

Russell O. Gunderson, Clerk.

#30485

STATE OF MINNESOTA

IN SUPREME COURT.

FOX FILM CORPORATION,
Plaintiff-Appellant,

vs.

A. B. MULLER,
Defendant-Respondent.

Ordered that the appeal in the above entitled matter be submitted to the Court without further argument upon

the printed record, and briefs of the parties heretofore filed in case No. 29872 bearing the same title, together with the files of the District Court of Hennepin County, Minnesota, showing subsequent proceedings had in that court.

JOHN P. DEVANEY
Chief Justice.

Dated April 8, 1935.

Filed April 8, 1935
Russell O. Gunderson, Clerk.
No. 152

Per Curiam

HENNEPIN COUNTY

FOX FILM CORPORATION,
Appellant,

30485 vs.

A. B. MULLER,
Respondent.

Endorsed:

Filed April 9, 1935
Russell O. Gunderson, Clerk
Minn. Supreme Court

OPINION

PER CURIAM

Appeal from a judgment. The case was here before and our opinion filed June 29, 1934. For the reasons given in the previous opinion and upon authority of that opinion the judgment appealed from is

Affirmed.

#30485

STATE OF MINNESOTA

IN SUPREME COURT.

FOX FILM CORPORATION,

Plaintiff-Appellant,

vs.

A. B. MULLER,

Defendant-Respondent.

WAIVER OF RIGHT TO REHEARING.

The plaintiff-appellant above named hereby waives its right to a rehearing in this Court of the decision of said court in above cause, made and filed April 9th, 1935.

SHEARER, BYARD & TROGNER,
Attorneys for Plaintiff-Appellant,
654 Security Building,
Minneapolis, Minn.

Dated April 10, 1935.

Supreme Court
Filed April 10, 1935.
Russell O. Gunderson, Clerk.

STATE OF MINNESOTA

IN SUPREME COURT

FOX FILM CORPORATION,

Appellant,

vs. 30485

A. B. MULLER,

Respondent.

The above entitled action having been submitted to the court upon the records and briefs filed heretofore in case No. 29872 bearing the same title and without oral argument,

IT IS ORDERED that no statutory costs be allowed.

Dated April 10, 1935.

LORING, *J.*
Associate Justice.

Filed Apr. 10, 1935
Russell O. Gunderson, Clerk.

STATE OF MINNESOTA,

SUPREME COURT

FOX FILM CORPORATION,

Appellant,

vs. 30485

A. B. MULLER,

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the final judgment and decree of the Court below, herein

appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

Dated and signed Apr. 11, 1935.

BY THE COURT.

Attest:

RUSSELL O. GUNDERSON,
Clerk.

STATE OF MINNESOTA

IN SUPREME COURT

I, RUSSELL O. GUNDERSON, Clerk of said Court, do hereby certify that the foregoing pages, numbered 1 to 102, inclusive, are a true, full and complete transcript of the record and proceedings in the case of

FOX FILM CORPORATION,
Appellant,

vs. 30485

A. B. MULLER,
Respondent,

and also of the opinions of the court rendered therein, as the same now appear on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at my office, in the city of Saint Paul, Minnesota, this 11th day of April, 1935.

RUSSELL O. GUNDERSON,
Clerk of Supreme Court of Minnesota.
By MAE SHERMAN
Deputy.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

MAY 9 1935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. [redacted] 47

FOX FILM CORPORATION,

Petitioner,

v.

A. B. MULLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. .....

FOX FILM CORPORATION,
Petitioner,

v.

A. B. MULLER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

PETITION.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully shows:

A. Summary Statement of the Matter Involved.

A prior petition for a writ of certiorari to the Supreme Court of Minnesota in this case was first granted by this Court and later dismissed as improvidently granted because no final judgment had been entered (R. 91-93; 293 U. S. 550; 79 L. Ed. 533). Thereafter, on April 11, 1935, a final judgment was entered in the case (R. 95-97, 102-103, 106-107).

This is an action brought by the petitioner, Fox Film Corporation, the owner and distributor of motion picture films, against the respondent, A. B. Muller, a motion picture exhibitor, upon two contracts made by the parties on or about September 6, 1929 (R. 2-9, 64). Each of these contracts provided, among other things, that the petitioner should grant to the respondent a license under copyright to exhibit and should deliver designated films and that the respondent should exhibit the films and pay the petitioner stipulated sums (R. 65, 66, 3-4, 7-8, 22). The petitioner, in accordance with the terms of the contracts, made such films available for the respondent's use and notified the respondent in writing that such films were available and tendered them, and performed all of the terms and conditions of the contracts on its part, but the respondent refused to accept or exhibit the films or pay any part of the stipulated sums (R. 65-67, 6, 8, 22). If the petitioner is entitled to recover, its damages are $1,838.42 (R. 56).

Following a trial before a Judge without a jury the District Court of the Fourth Judicial District, County of Hennepin, State of Minnesota, rendered a decision dismissing the action on the sole ground that the contracts sued upon were "null and void and illegal, and in violation of the Sherman Anti-Trust Act" (R. 50, 56). The petitioner made a motion in the Minnesota District Court for judgment notwithstanding the decision or for a new trial, and the motion was denied (R. 70-72). On appeal the Supreme Court of Minnesota affirmed the order denying the motion (R. 74, 89) and denied an application by the petitioner for reargument (R. 88, 84-87). Thereupon the first petition for certiorari was filed in this Court. After such petition had been dismissed as improvidently granted the District Court entered a judgment and decree adjudging that each of the contracts sued upon is "null and void and illegal, and in violation of the Sherman Anti-Trust Act," and dismissing the action with costs to the respondent, and, on appeal, the Supreme Court of Minnesota entered a final judgment affirming the judgment of the District Court (R. 95-97, 102-103, 106-107).

The District Court found that the printed portions of each of the contracts were substantially the same as the form known as the "Standard Exhibition Contract" involved in the case of *United States* v. *Paramount Famous Lasky Corporation et al.* (34 F. [2d] 984, aff'd 282 U. S. 30), that the Standard Exhibition Contract contains in paragraph Eighteenth a compulsory arbitration clause providing for penalties to be imposed upon an exhibitor if he refuses to arbitrate or to abide by any arbitration award and for joint summary action by the distributors to enforce the clause against the exhibitors, and that the paragraph Eighteenth contained in each of the contracts sued upon is the same as the paragraph Eighteenth in the contract held by the decisions in the *Paramount* case to be illegal and unenforceable. (R. 68, 55).

In the *Paramount* case the United States sued under Section 4 of the Sherman Anti-Trust Act (Act of Congress, July 2, 1890, c. 647, 26 Stat. 209) to enjoin the petitioner and several other distributors from further engaging in a conspiracy in restraint of trade in violation of Section 1 of that Act* (34 F. [2d] 984). The gist of the conspiracy charged in the petition of the United States was the action of the defendants in carrying on their interstate trade in motion picture films in accordance with an understanding and agreement between them the purpose and object of which was to coerce every exhibitor of motion picture films in the United States (1) to submit to arbitration any dispute with any of the distributors arising under any contract licensing the

---

* Section 1 provides as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

exhibition of motion pictures, (2) to waive the right to have any such dispute determined by any court and (3) to comply with any award rendered against him in any such arbitration. (See extract from petition set forth in Appendix A.) On January 21, 1930, the United States District Court for the Southern District of New York made a decree in the *Paramount* case. (A copy of the decree is set forth in Appendix B.) Section I of this decree declared that the agreement of the defendants to adopt and to use exclusively the Standard Exhibition Contract in contracting with exhibitors, their adoption of certain "Rules of Arbitration," and the means by which they collectively coerced adoption of and compliance with such contract and such rules constituted a conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act. Section II of the decree contained provisions enjoining the defendants, among other things, from further engaging in or carrying out such conspiracy and from entering into any contract embodying the provisions of paragraph Eighteenth of the Standard Exhibition Contract and/or the Rules of Arbitration. This section of the decree also contained provisions enjoining the defendants

> "4. From enforcing, directly or indirectly, any of the provisions of paragraph 'Eighteenth,' entitled 'Arbitration,' of said 'Standard Exhibition Contract' dated May 1, 1928, against any exhibitor of motion pictures in the United States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph."

and

> "8. From suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to comply with any provision of said paragraph 'Eighteenth' of said 'Standard Exhibit Contract' of May 1, 1928, or of said 'Rules of Arbitration' dated May 1, 1926, unless there be legal cause for suspending or refusing to promptly resume such service arising independently of any of the provisions of said paragraph 'Eighteenth' of said 'Standard Exhibition Contract' or of said Rule IV of said 'Rules of Arbitration.'"

Section III of the decree contained the following:

> "Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree."

The decree was affirmed without modification by this Court (282 U. S. 30).

Since the decision of this Court in the *Paramount* case, all machinery, methods and rules for arbitration under the Standard Exhibition Contract have been abolished, and the petitioner claimed no right in this action under paragraph Eighteenth (R. 68-69).

B. Specification of Errors.

The Minnesota courts erred:

1. In sustaining the respondent's defense of illegality;

2. In holding that the contracts sued upon are rendered unenforceable in this action by the Sherman Anti-Trust Act;

3. In holding that the contracts sued upon are illegal and void in their entirety; and

4. In failing to correctly apply the decision in the *Paramount* case (Appendix B; 34 F. [2d] 984, aff'd 282 U. S. 30).

C. Reasons Relied on for the Allowance of the Writ.

1. The Minnesota courts decided a federal question of substance in a way not in accord with applicable decisions of this Court.

(a) The Minnesota courts held that the Standard Exhibition Contract is rendered illegal, void and unenforceable *in its entirety* by the Sherman Anti-Trust Act (R. 56, 89, 95-96, 106-107, 77-83). In the *Paramount* case, however, this Court affirmed a decree which, in effect, held only the arbitra-

tion provisions of such contract illegal, enjoined the distributors, including the petitioner, from refusing to perform the remainder of such contract because of non-performance by the exhibitor of such provisions, and saved to the distributors their right to continue to perform and enforce by any lawful means any obligation of such contract the performance or enforcement of which is consistent with the decree, and thus, in effect, held such contract, except the arbitration provisions, legal, valid and enforceable (Appendix B; 282 U. S. 30). (See pp. 3-5, *supra*, and pp. 10-12, *infra*.)

(b) The Minnesota courts denied the right of a distributor to compel performance of the Standard Exhibition Contract other than the illegal provisions on the part of an exhibitor, although the decree affirmed by this Court in the *Paramount* case enjoined each distributor from refusing such performance on his part. (See pp. 10-12, *infra*).

(c) The Minnesota courts sustained a defense founded on the Sherman Anti-Trust Act, although this Court has denied the sufficiency of such a defense in analogous cases. (See pp. 13-15, *infra*).

2. The question whether the provisions of the Standard Exhibition Contract other than those condemned in the *Paramount* case are rendered unenforceable by the decision in such case or by the Sherman Anti-Trust Act is a question of great general importance which has been the subject of conflicting decisions in several of the highest state courts and federal courts and should be determined by this Court. At the time of the decree in the *Paramount* case many thousands of Standard Exhibition Contracts were outstanding (R. 57; 34 F. [2d], pp. 984-986). Following that decision numerous actions similar to the present one were commenced by distributors upon Standard Exhibition Contracts in many different jurisdictions (R. 57-58). In very rapid succession a number of conflicting decisions have come down in different state and federal courts (R. 58). The federal question

involved in the present case has been decided contrary to the decision of the Minnesota court in the following cases:

Paramount Famous Lasky Corporation v. *National Theatre Corporation,* 49 F. (2d) 64 (C. C. A., 4th Circ., Apr. 13, 1931);

Fox Film Corporation v. *Ogden Theatre Co.,* 82 Utah 279, 17 P. (2d) 294 (Dec. 29, 1932);

Fox Film Corporation v. *Buchanan,* 17 La. App. 285, 136 So. 197 (July 14, 1931);

Columbia Pictures Corporation v. *Bi-Metallic Inv. Co.,* 42 F. (2d) 873 (D. C., D. Colo., Aug. 8, 1930); and

Metro-Goldwyn-Mayer Distributing Corporation v. *Cocke,* 56 S. W. 489 (Tex. Civ. App., Jan. 18, 1933);

and in accord with the decision of the Minnesota court in the following cases:

Fox Film Corporation v. *Tri-State Theatres,* 51 Idaho 439, 6 P. (2d) 135 (Dec. 18, 1931);

United Artists Corporation v. *Odeon Building, Inc.,* 212 Wis. 150, 248 N. W. 784 (June 6, 1933);

United Artists Corporation v. *Piller,* 62 N. D. 289, 244 N. W. 20 (June 30, 1932);

Vitagraph v. *Theatre Realty Co.,* 50 F. (2d) 907 (D. C., E. D. Pa., Apr. 28, 1931);

Universal Film Exchanges, Inc. v. *West,* 163 Miss. 272, 141 So. 293 (Apr. 26, 1932); and

Fox Film Corporation v. *C. & M. Amusement Co.,* 58 F. (2d) 337 (D. C., S. D. Ohio, E. D., Mar. 28, 1932).

We respectfully submit that this conflict in the application of the Sherman Anti-Trust Act should be settled by the authoritative decision of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of the State of Minnesota commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case of Fox Film Corporation, Appellant, v. A. B. Muller, Respondent, Docket Nos. 29872 and 30485, and that the judgment herein of the Supreme Court of the State of Minnesota be reversed by this Court, and that your petitioner may have further relief as to this Court may seem proper.

Dated: May 8, 1935.

FOX FILM CORPORATION,
JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The Opinions of the Courts Below.

The opinion of the Supreme Court of Minnesota filed April 9, 1935, affirming the judgment of the District Court (R. 104) is not yet reported in either the official or unofficial reports. Its opinion filed June 29, 1934, affirming the order of the District Court denying the petitioner's motion for judgment notwithstanding the decision or for a new trial (R. 77-83) is reported in 255 N. W. 845, but is not yet reported in the official reports. The memoranda written by the District Court in connection with its decision (R. 57-63) and its order denying the petitioner's motion for judgment notwithstanding the decision or for a new trial (R. 73) are unreported.

Jurisdiction.

The jurisdiction of this Court to review the final judgment entered by the Supreme Court of Minnesota in this case on April 11, 1935 (R. 106-107) is invoked under Section 237 (b) of the Judicial Code as amended (Act of Congress, Feb. 13, 1925, c. 229, § 1, 43 Stat. 937), which gives this Court jurisdiction to review, by certiorari, any cause wherein a final judgment has been rendered by the highest court of a state "where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of * * * the United States." The respondent claimed a right, privilege or immunity under the Sherman Anti-Trust Act (Act of Congress, July 2, 1890, c. 647, 26 Stat. 209), by pleading in its answer (R. 9-18) a defense to the effect that the contracts sued upon are rendered unenforceable in this action by such Act. *Cf. Nutt v. Knut*, 200 U. S. 12; *Bement National Harrow Co.*, 186

U. S. 70.* The sufficiency of this defense was the only issue litigated and was the sole ground of the decision sought to be reviewed (R. 21-24, 56, 77-83, 95-96, 104, 106-107). The fact that the decision was expressly rested upon a determination of the federal question gives this Court jurisdiction regardless of whether non-federal questions were also raised. *Virginia* v. *Imperial Coal Co.*, 293 U. S. 15, 16-17.

Statement of the Case and Specification of Errors.

The statement of the case and the specification of errors are contained in the petition.

ARGUMENT.

FIRST: The decision of the Supreme Court of Minnesota conflicts with the decision of this Court in the *Paramount* case (282 U. S. 30) upon the effect of the Sherman Anti-Trust Act on the validity of the Standard Exhibition Contract and the rights of the petitioner under such contract.

The Supreme Court of Minnesota affirmed a judgment based upon a holding that the Standard Exhibition Contracts sued upon "are null and void and illegal, and in violation of the Sherman Anti-Trust Act" (R. 95-96, 106-107). In its opinion it described the respondent's position as follows:

> "The defendant relies upon the total illegality of the leasing contracts as in restraint of trade in viola-

* Section 709 of the Revised Statutes, under which these cases came up, gave this Court power to review the final judgment of the highest court of a state "where any title, right, privilege or immunity" was claimed under a statute of the United States and the decision was *against* such title, right, privilege or immunity. See *Nutt* v. *Knut*, p. 19. The power to review given by the present Section 237 (b) of the Judicial Code, however, "may be exercised as well where the Federal claim is sustained as where it is denied."

> tion of the Federal anti-trust act as determined in the United States v. Paramount, 34 F. (2d) 984, affirmed in 282 U. S. 30, 51 S. Ct. 42, 75 L. ed. 145" (R. 78).

It construed the decision in the *Paramount* case as holding that the Standard Exhibition Contract is illegal in its entirety (R. 80-81).

The decision in the *Paramount* case did not hold the Standard Exhibition Contract illegal in its entirety, but on the contrary held that such contract, except for the arbitration provisions, is legal, valid and enforceable.

The conspiracy condemned in the *Paramount* case was a conspiracy among the distributors to impose compulsory arbitration upon the exhibitors and the arbitration provisions contained in paragraph Eighteenth of the Standard Exhibition Contract constituted one of the means by which this conspiracy was pursued (Appendices A and B; 34 F. [2d], pp. 984, 986-988; 282 U. S., pp. 37-41). Accordingly, the decree in the *Paramount* case, in enjoining the distributors from pursuing the conspiracy, expressly enjoined them from entering into any agreement embodying the provisions of paragraph Eighteenth or enforcing any of such provisions "against any exhibitor of motion pictures in the United States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph" (Appendix B, Sec. II [3], [4]). Since the court must necessarily have realized that all or practically all of the many thousands of existing contracts were in the standard form (see 34 F. [2d], p. 987; R. 57), the fact that it enjoined the distributors from enforcing paragraph Eighteenth of the "existing" contracts shows that it did not hold the other portions of the Standard Exhibition Contract illegal, but on the contrary contemplated that they would be performed just as if the illegal paragraph had been deleted. That this is the correct construction of the decree is shown also by the provision enjoining the distributors "from suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to comply with any provision of said paragraph

'Eighteenth'" (Appendix B, Sec. II [8]) and the provision to the effect that nothing in the decree should be construed as prohibiting any defendant "from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree" (Appendix B, Sec. III). Had the court intended these provisions of its decree to apply only to the few contracts, if any, which might be in existence other than the many thousands of Standard Exhibition Contracts, it would certainly have said so.

By enjoining the distributors "from suspending and from refusing to promptly resume service to any exhibitor" because of non-compliance with paragraph Eighteenth the court not only indicated that it contemplated the continued performance of the portions of the Standard Exhibition Contracts other than paragraph Eighteenth, but also, in effect, imposed upon each distributor, including the petitioner, an affirmative duty to continue performance of such portions of the Standard Exhibition Contracts.

In affirming the decree in the *Paramount* case without modification this Court in effect held that except for paragraph Eighteenth the Standard Exhibition Contract is legal, and is enforceable *against the petitioner*. Thus the decision of the Supreme Court of Minnesota that the Standard Exhibition Contracts sued upon are illegal in their entirety, and are not enforceable *against the respondent*, conflicts with the decision of this Court both upon the effect of the Sherman Anti-Trust Act on the validity of the Standard Exhibition Contract and the rights of the petitioner under such contract. In effect it holds that, although as was held in the *Paramount* case the petitioner has duties under the contract to the respondent, the respondent has no correlative duties under the contract to the petitioner. A situation more incompatible with a uniform application of the Sherman Anti-Trust Act can hardly be imagined, and we respectfully submit that the jurisdiction of this Court should be exercised to correct it.

SECOND: The decision of the Supreme Court of Minnesota conflicts with the applicable decisions of this Court on the sufficiency in an action upon contract of a defense founded on the Sherman Anti-Trust Act.

The decision of the Supreme Court of Minnesota rests upon the assumption that the whole contract is "tainted by the illegal arbitration clause" (R. 82). Apart from the above-mentioned decision in the *Paramount* case, it is well settled that a contract is not necessarily "tainted" because it may contain an illegal provision in restraint of trade or an illegal arbitration provision. See *Paramount Famous Lasky Corporation* v. *National Theatre Corporation,* 49 F. (2d) 64, 66 (C. C. A., 4th Circ.), and *Fox Film Corporation* v. *Ogden Theatre Co.,* 82 Utah 279, 17 P. (2d) 294, 297 and authorities there cited. See also *Oregon Steam Navigation Co.* v. *Winsor,* 20 Wall. 64, 70. The arbitration provisions in the Standard Exhibition Contract have no necessary or inseverable relation to the remainder of the contract. The contract was adopted in the interests of both the distributors and the exhibitors for the purpose of carrying on their regular business in connection with the furnishing and use of motion picture films (34 F. [2d], pp. 985-986). Arbitration was merely one of the means of enforcing the contract and there is no reason to suppose that it was a major consideration of the contract or that the deletion of the provisions for arbitration and the enforcement of the remainder of the contract will work injustice to the exhibitors. Therefore, if the whole contract is "tainted," it must be because its enforcement even without the illegal arbitration clause will contravene the Sherman Anti-Trust Act or public policy.

The combination which was held to violate the Sherman Anti-Trust Act in the *Paramount* case was a combination of distributors for the purpose of imposing compulsory arbitration upon the exhibitors. The only provisions of the Standard Exhibition Contract which contributed to the accomplishment of this purpose are the arbitration provisions. The Standard Exhibition Contract is not the arrangement by which the combination came into existence, but is

merely collateral to such arrangement (Appendix B, Sec. I). There is no necessary connection between the provisions sought to be enforced in this action and such arrangement, and the enforcement of such provisions will have no tendency to accomplish the purpose of the combination. The decisions of this Court show that under such circumstances the Sherman Anti-Trust Act affords no defense to an action upon contract. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165; *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248.

In *Connolly* v. *Union Sewer Pipe Co., supra*, this Court sustained a judgment for the price of sewer pipe sold and delivered, notwithstanding the fact that the plaintiff was an illegal combination organized for the purpose of preventing competition in the manufacture and sale of sewer pipe and limiting the production of and increasing and controlling the wholesale and retail price of the product, and the fact that the combination was acting for such purpose in making the sales upon which the action was founded. In the majority opinion this Court said, at page 551:

> "The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal yet the sale to the defendants was valid."

In *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co., supra,* this Court affirmed a judgment for the price of glucose sold and delivered, notwithstanding the fact that the plaintiff was a combination which was illegally organized with the object of monopolizing all dealings in the product, and had unreasonably advanced the price of the product to the injury of the public and sought to and did drive competitors out of the field by means of offering to customers a percentage of profits upon the condition of their dealing exclusively with it.

In *A. B. Small Co.* v. *Lamborn & Co., supra,* this Court affirmed a judgment for the difference between the contract price of sugar which the defendant had contracted for and refused to accept and the amount obtained by the plaintiff upon resale, notwithstanding the facts that the plaintiff and others had entered into an illegal combination to manipulate trade in refined sugar with a view to increasing the price, that the contracts sued upon were made during the life of the combination and that the plaintiff conformed the terms of sale to the standards sanctioned by the combination.

The Supreme Court of Minnesota relied upon *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227 (R. 83). In that case this Court affirmed a judgment which denied recovery by the representative of an illegal combination for the price of wall paper sold and delivered to a dealer. The case involved certain facts which distinguished it from both the *Connolly* case and the present one. There, as in the *Connolly* case, the purpose of the combination was to monopolize and prevent competition in the manufacture and sale of, limit the production of and increase the wholesale and retail price of a product. The agreement sued upon, however, obligated the dealer to buy from no one but members of the combination and to refrain from selling to the public at less than scheduled prices under penalty of being unable to buy wall paper and being driven out of business. It was admitted on demurrer that "the immediate, intended and direct effect of the said combination and agreements was the stifling of competition between the manufacturers and

vendors of wall paper, and between the jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one-half more than the price which it would be had the same been left to free and unrestrained competition," and that the prices sued for were "the prices fixed and determined in pursuance of and by the combination" and were "unreasonable, unjust and excessive and at least one-half more than they would otherwise have been" and "above the fair market price of such merchandise by more than the amount sought to be recovered" (pp. 251, 253). In the majority opinion of this Court it was concluded that the plaintiff, representing an illegal combination, could not have a judgment for the amount of the account sued on "because, for the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination" (pp. 266-267). The principal reasons for this conclusion were thus stated in the opinion:

> "If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination.
>
> * * * * * * *
>
> "Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends" (pp. 261-262).

In the *Wilder* case, *supra*, this Court approved the ruling in the *Connolly* case (p. 172) and, in distinguishing the ruling in the *Continental Wall Paper* case, said that that case

> "* * * was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to

allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale" (p. 177).

We submit that the *Continental Wall Paper* case held merely that enforcement of a contract will be denied where it would aid an illegal combination "to accomplish forbidden ends." This would certainly have been the result of permitting the combination to recover from the dealer the admittedly "unreasonable, unjust and excessive" price, the exacting of which was one of the principal purposes of the combination. The enforcement of the contract involved in the present case, however, obviously will not accomplish or have any tendency to promote the "forbidden ends" of the combination which was condemned in the *Paramount* case.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari to review and by reviewing and reversing the decision of the Supreme Court of Minnesota.

JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

APPENDIX A.

Extract from Petition in *United States* v. *Paramount.*

VIII.

THE CONSPIRACY.

The defendants, each well knowing all the matters and things hereinbefore alleged, unlawfully have engaged in a conspiracy in restraint of said interstate trade and commerce in motion picture films so carried on as aforesaid by said defendant distributors, by said members of said defendant Film Boards of Trade, and by all said exhibitors of motion pictures in the United States, that is to say, in a conspiracy now here described in restraint of, and which throughout the period of time herein mentioned in fact unlawfully has restrained, and which now is restraining said interstate trade and commerce, to wit:

Since on or about July, 1922, said defendant distributors have carried on their said interstate trade and commerce in motion picture films in accordance with and pursuant to an understanding and agreement between said defendant distributors:

a. To coerce and to require every exhibitor of motion picture films in the United States to submit to arbitration any question or dispute with any member of any defendant Film Board of Trade arising under any contract licensing the exhibition of a motion picture or of motion pictures;

b. To coerce and to require every exhibitor of motion pictures in the United States to surrender and to waive the right to have any question or dispute with any member of any defendant Film Board of Trade arising under any contract licensing the exhibition of a motion picture or of motion pictures, settled and determined by any court having jurisdiction of such question or dispute;

c. To coerce and to require every exhibitor of motion pictures in the United States to comply with any award rendered against him in any arbitration proceeding as aforesaid, without recourse or appeal to any court having jurisdiction of said question or dispute.

Since in or about July, 1922, said defendant distributors have carried on their said interstate trade and commerce in motion picture films in accordance with and pursuant to an understanding and agreement between said defendant distributors to carry out and to accomplish the aforesaid purposes and objects:

a. By refusing to enter into any contract with any exhibitor of motion pictures in the United States to license the exhibition of any motion picture and to transport, supply and deliver any motion picture film in the course of the aforesaid interstate trade and commerce, except on the terms and under the contions (hereinafter specified) agreed upon by said defendant distributors;

b. By refusing to transport, supply and deliver in the course of the aforesaid interstate trade and commerce any motion picture film to any exhibitor of motion pictures in the United States having a contract therefor, in the event of the failure or refusal of said exhibitor fully to comply with any term or condition (hereinafter specified) agreed upon by said defendant distributors.

All in the manner and by the means more particularly set forth hereinafter.

APPENDIX B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, *Petitioner,* *against* PARAMOUNT FAMOUS LASKY CORPORATION, *et al.,* *Defendants.*	E. 45-100.

DECREE

This cause having come on to be heard, and the Court having considered the evidence and the arguments of counsel, and having filed its Opinion herein on the 15th day of October, 1929, and upon motion of the petitioner by Charles H. Tuttle, United States Attorney for the Southern District of New York, and John Lord O'Brian, the Assistant to the Attorney General, and C. Stanley Thompson, Special Assistant to the Attorney General, of Counsel, for relief in accordance with the prayer of the petition, and the defendants having appeared by their attorneys, Cadwalader, Wickersham & Taft, and Edwin P. Grosvenor, Arthur L. Fisk, Jr., and Gabriel L. Hess, of Counsel; now, therefore, it is

ORDERED, ADJUDGED AND DECREED as follows:

I

That the agreement of the defendants to adopt and to use exclusively in contracting with exhibitors of motion pictures throughout the United States the "Standard Exhibition Contract" dated May 1, 1928, which is attached to the petition herein as Exhibit "C" thereto, the adoption by the defendants of the "Rules of Arbitration" dated May 1, 1928, which is

attached to the petition herein as Exhibit "G" thereto, and all the activities and agreements of said defendants by means of which they have collectively coerced adoption of and compliance with said "Standard Exhibition Contract" and said "Rules of Arbitration," constitute a conspiracy in restraint of interstate trade and commerce in violation of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," known as the Sherman Anti-Trust Act.

II

That the defendants, their officers, agents, servants and employees, and all persons acting under, through or on behalf of them, or any of them, hereby are perpetually enjoined, restrained and prohibited, individually and collectively: * * *

1. From further engaging in or carrying out said conspiracy or any other conspiracy similar to or having the same purpose and/or effect as said conspiracy.

2. From doing any act or thing whatsoever for the purpose or with the effect of carrying out hereafter the purposes of said conspiracy, or any of them.

3. From entering into any agreement embodying the provisions of paragraph "Eighteenth" of said "Standard Exhibition Contract" dated May 1, 1928, and/or the provisions of said "Rules of Arbitration" dated May 1, 1928.

4. From enforcing, directly or indirectly, any of the provisions of paragraph "Eighteenth," entitled "Arbitration," of said "Standard Exhibition Contract" dated May 1, 1928, against any exhibitor of motion pictures in the United States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph.

5. From enforcing, directly or indirectly, any of the provisions of Rule IV, entitled "Enforcement of Decisions of Board of Arbitration," of said "Rules of Arbitration" dated May 1, 1928, against any exhibitor of motion pictures in

the United States, on account of any claim, controversy or dispute arising under or on account of any existing contract licensing the exhibition of a motion picture or of motion pictures.

6. From demanding security from any exhibitor of motion pictures in the United States because of any failure or refusal to comply with any provisions of said paragraph "Eighteenth," entitled "Arbitration," of said "Standard Exhibition Contract" of May 1, 1928, contained in any existing contract licensing the exhibition of a motion picture or of motion pictures.

7. From retaining any sum or sums heretofore received in accordance with the provisions of said paragraph "Eighteenth" of said "Standard Exhibition Contract" dated May 1, 1928, and/or said Rule IV entitled "Enforcement of Decisions of Board of Arbitration" of said "Rules of Arbitration" dated May 1, 1928, from any exhibitor of motion pictures in the United States, as security for the performance of any contract licensing the exhibition of a motion picture or of motion pictures.

8. From suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to comply with any provision of said paragraph "Eighteenth" of said "Standard Exhibition Contract" of May 1, 1928, or of said "Rules of Arbitration" dated May 1, 1928, unless there be legal cause for suspending or refusing to promptly resume such service arising independently of any of the provisions of said paragraph "Eighteenth" of said "Standard Exhibition Contract" or of said Rule IV of said "Rules of Arbitration."

9. From continuing to act upon and from entering into any understanding, arrangement, combination, conspiracy or agreement either to refrain from entering into any contract for licensing the exhibition of a motion picture or motion pictures, or to require the deposit of security as a condition for entering into or continuing to perform any such contract which has not been breached by the exhibitor, or to fix

in advance any terms or conditions upon which any defendant or any member of any defendant Film Board of Trade shall enter into any such contract,—if the purpose or effect of such understanding, arrangement, combination, conspiracy or agreement is either:

(a) To coerce or to require any exhibitor of motion pictures in the United States to submit to arbitration any claim, controversy or dispute with any defendant or with any member of any defendant Film Board of Trade, arising under any contract licensing the exhibition of a motion picture or of motion pictures; or

(b) To coerce or to require any exhibitor of motion pictures in the United States to surrender and to waive the right to have any claim, controversy or dispute with any defendant or with any member of any defendant Film Board of Trade, arising under any contract licensing the exhibition of a motion picture or of motion pictures, settled and determined by any Court having jurisdiction of such claim, controversy or dispute; or

(c) To coerce or to require any exhibitor of motion pictures in the United States to comply with any award rendered against him in any arbitration proceeding with any defendant or with any member of any defendant Film Board of Trade, arising under or on account of any contract licensing the exhibition of a motion picture or of motion pictures, without recourse or appeal to any Court having jurisdiction of the claim, controversy or dispute occasioning said award.

III

Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of

this decree. Nor shall anything contained in this decree be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from selecting his or its own trade, from disposing of his or its own products, or from making any contracts with or without provisions relating to arbitration—all upon such terms as he or it may choose—provided such acts are done individually and without combining, conspiring or agreeing with any other defendant or any member of any Film Board of Trade.

Nothing contained in this decree shall be construed in derogation of the right of the defendants, or any of them, individually or jointly, to negotiate and to agree with any exhibitors of motion pictures on a standard form of contract to be used in licensing the exhibition of motion pictures or on any standard provision or provisions to be included in such license contracts, including reasonable provisions for the arbitration of disputes arising thereunder, if done voluntarily and without coercion, and if applied only to the parties to the negotiations and agreement.

Nothing contained in this decree shall be construed as limiting or modifying, or shall in anywise limit, restrict, modify or qualify, the Opinion filed in the companion case hereto, *"United States* v. *First National Pictures, Inc., et al."* (In Equity No. 45-99), and the decree of the Court entered therein dismissing the petition of the Government on the merits as against the defendants herein; in which case it was held that the Rules and Regulations for the establishment and operations of a Credit Committee, annexed to said petition as "Exhibit A," as agreed to, adopted and enforced by these defendants, was not and is not in violation of the Sherman Anti-Trust Act, and that these defendants have not engaged in a combination or conspiracy to restrain trade or commerce in violation of said Act on account of their adoption and enforcement of and operation under said Credit Rules and Regulations.

IV

Jurisdiction of this cause is hereby retained for the purpose of enforcing this decree and making such other and further orders and decrees as may become necessary, and for the purpose of enabling any party hereto to apply to the Court for such further orders and directions as may be necessary or proper in relation to the carrying out of the provisions of this decree, or to apply to the Court for modification hereof if it be hereafter shown to the satisfaction of the Court that by reason of changed conditions or changes in the statute law of the United States the provisions hereof have become inadequate or inappropriate, or have become unduly oppressive to the defendants, and are no longer necessary to secure conditions in harmony with the law.

Dated: New York, January 21st, 1930.

(Sgd.) T. D. THACHER,
United States District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935
No. 47

FOX FILM CORPORATION,
Petitioner,

v.

A. B. MULLER,
Respondent.

BRIEF FOR PETITIONER

JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

CHARLES E. HUGHES, JR.,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 47

FOX FILM CORPORATION,
Petitioner,

v.

A. B. MULLER,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR PETITIONER

This case is here on writ of certiorari granted June 3, 1935, to review a final judgment of the Supreme Court of the State of Minnesota affirming a judgment and decree of the District Court of the Fourth Judicial District, County of Hennepin, State of Minnesota (R. 108, 106-107). The judgment and decree so affirmed dismissed the action, which had been brought by the petitioner against the respondent upon two contracts (R. 95-96, 2-9).

A prior petition for writ of certiorari in this case was granted by this Court on December 3, 1934 (R. 91). When the case was called for argument it appeared that no final judgment had been made by the Minnesota courts, and the

writ was dismissed on February 18, 1935, as improvidently granted (R. 92).

Opinions of the Courts Below

The opinion of the Supreme Court of Minnesota filed April 9, 1935, affirming the judgment and decree of the District Court (R. 104) is reported in 260 N. W. 320 but is not yet reported in the official reports. This opinion was rendered upon the authority of an opinion of the same court filed June 29, 1934, affirming the order of the District Court denying the petitioner's motion for judgment notwithstanding the decision of the District Court or for a new trial (R. 77-83, 72). The latter opinion is reported in 192 Minn. 212 and 255 N. W. 845. The memoranda written by the District Court in connection with its decision (R. 57-63) and with its order denying the petitioner's motion for judgment notwithstanding the decision or for a new trial (R. 73) are both unreported.

Jurisdiction

A final judgment was entered by the Supreme Court of the State of Minnesota in this case on April 11, 1935 (R. 106-107). The sole question decided by the Minnesota courts was the sufficiency of the defense pleaded in respondent's answer that the Sherman Anti-Trust Act (Act of Congress, July 2, 1890, c. 647, 26 Stat. 209) made the contracts in suit unenforceable. The jurisdiction of this Court to review the judgment is invoked under Section 237 (b) of the Judicial Code as amended (Act of Congress, Feb. 13, 1925, c. 229, § 1, 43 Stat. 937). See *Nutt* v. *Knut*, 200 U. S. 12; *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165.

Statement

This is an action brought by the petitioner, Fox Film Corporation, the owner and distributor of motion picture films, against the respondent, A. B. Muller, a motion picture exhibitor, upon two contracts made on or about September 6, 1929 (R. 2-9, 22). Each of these contracts* provided, among other things, that the petitioner should license the exhibition by the respondent of designated films and that the respondent should exhibit the films under the license and pay the petitioner stipulated sums for such license (Appendix A, pp. 28-30, *infra*). The petitioner, in accordance with the terms of the contracts, made such films available for the respondent's use and notified the respondent in writing that such films were available and tendered them, and also shipped certain of such films to the respondent at his request, but the respondent refused to perform his part of the contract (R. 6, 8, 22).

Respondent asserted that the contracts violated the Sherman Anti-Trust Act (Act of Congress, July 2, 1890, c. 647, 26 Stat. 209) and were illegal (R. 22). In connection with this defense it was stipulated at the trial that the printed portions of each of the contracts sued upon are substantially the same as the contract construed by the decision in *United States* v. *Paramount Famous Lasky Corporation et al.* (34 F. (2d) 984, aff'd 282 U. S. 30); that paragraph Eighteenth of each of the contracts sued upon, known as the "arbitration clause", is the same as paragraph Eighteenth of the contract construed by that decision; that this paragraph had been held by that decision to be illegal

*Photostatic copies of these contracts are in the record as plaintiff's Exhibits A and B (R. 75-76). For the convenience of the Court printed copies are set forth in Appendix A hereto.

and unenforceable; and that the petitioner had been one of the defendants in that case (R. 22-23).

The contract construed in the *Paramount* case is a form contract known as the "Standard Exhibition Contract" (34 F. (2d), pp. 985-986; Appendix A, p. 28, *infra*). The arbitration clause in paragraph Eighteenth of the standard form provides for compulsory arbitration of all claims and controversies arising under the contract (Appendix A, pp. 39-41, *infra*).

In the *Paramount* case the United States sued under Section 4 of the Sherman Anti-Trust Act to enjoin the petitioner and several other distributors from further engaging in a conspiracy in restraint of trade, described in the petition (see excerpt printed in Appendix B, pp. 59-60, *infra*), in violation of Section 1 of that Act* (34 F. (2d) 984). On January 21, 1930, the United States District Court for the Southern District of New York made a decree, a copy of which is printed in Appendix C (pp. 61-66, *infra*). The nature of the conspiracy charged in the Government's petition, and the terms of the decree, will be later discussed in connection with the argument (*infra*, pp. 10-14). It is sufficient to say, for purposes of this statement, that the Minnesota courts, following the contention of respondent, interpreted the *Paramount* case as declaring not only the coercive arbitration provisions but

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*Section 1 provides as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

the whole of the contracts in suit illegal; while petitioner contends that the illegality declared was confined to parts of the contracts providing for compulsory arbitration and that the decree expressly adjudged the terms providing for reciprocal engagements for the licensing of, and taking and paying for, motion picture films to be enforceable by either party. The decree of the District Court was affirmed by this Court (282 U. S. 30).

After the decision of this Court in the *Paramount* case, all machinery, methods and rules for arbitration under the Standard Exhibition Contracts were abolished (R. 23).

At the time of the decree in the *Paramount* case many thousands of Standard Exhibition Contracts were outstanding (R. 57; 34 F. (2d), pp. 984-986), including those involved in the present case (R. 3, 7, 22; Appendix C, p. 66, *infra*). There ensued numerous conflicting decisions in actions like the present one commenced upon Standard Exhibition Contracts by distributors against exhibitors who refused to accept or refused to pay for films (R. 57-58).

In the following cases, it was held that the distributors could enforce provisions of the Standard Exhibition Contract similar to those upon which this action is based, notwithstanding the illegality of the coercive arbitration provisions: *Paramount Famous Lasky Corp.* v. *National Theatre Corp.*, 49 F. (2d) 64 (C. C. A., 4th Circ.); *Fox Film Corp.* v. *Ogden Theatre Co., Inc.*, 82 Utah 279, 17 P. (2d) 294; *Fox Film Corp.* v. *Buchanan*, 17 La. App. 285, 136 So. 197; *Fox Film Corp.* v. *Bailly*, 61 S. D. 22, 246 N. W. 111; *Walker Theatre Co.* v. *R. K. O. Distributing Corp.*, 98 Ind. App. 331, 189 N. E. 162; *Columbia Pictures Corp.* v. *Bi-Metallic Inv. Co.*, 42 F. (2d) 873 (D. C., D.

Colo.); and *Metro-Goldwyn-Mayer Distributing Corp.* v. *Cocke*, 56 S. W. (2d) 489 (Tex. Civ. App.).

In the following cases the contrary was held on the theory that the entire contract is unenforceable: *Vitagraph, Inc.* v. *Theatre Realty Co., Inc.*, 50 F. (2d) 907 (D. C., E. D. Pa.); *Fox Film Corp.* v. *Tri-State Theatres*, 51 Idaho 439, 6 P. (2d) 135; *Fox Film Corp.* v. *C. & M. Amusement Co.*, 58 F. (2d) 337 (D. C., S. D. Ohio, E. D.); *Universal Film Exchanges, Inc.* v. *West*, 163 Miss. 272, 141 So. 293; *United Artists Corp.* v. *Odeon Building, Inc.*, 212 Wis. 150, 248 N. W. 784; *United Artists Corp.* v. *Piller*, 62 N. D. 289, 244 N. W. 20; and *First National Pictures, Inc.* v. *Pappe*, 170 Okl. 279, 39 P. (2d) 526.

In the present case, following a trial before a Judge without a jury (R. 50), the District Court of the Fourth Judicial District, County of Hennepin, State of Minnesota, rendered a decision dismissing the action on the sole ground that the contracts sued upon were "null and void and illegal, and in violation of the Sherman Anti-Trust Act" (R. 56). The petitioner made a motion in the Minnesota District Court for judgment notwithstanding the decision or for a new trial, and the motion was denied (R. 70-72). On appeal the Supreme Court of Minnesota affirmed the order denying the motion (R. 74, 89) and denied an application by the petitioner for reargument (R. 88, 84-87). After the prior writ of certiorari had been dismissed by this Court as improvidently granted, the District Court entered a judgment and decree adjudging that each of the contracts sued upon is "null and void and illegal, and in violation of the Sherman Anti-Trust Act," and dismissing the action; and, on appeal, the Supreme Court of Minnesota entered a final judgment affirming the judgment of the District Court (R. 95-97, 102-103, 106-107).

Specification of Errors

The Minnesota courts erred:

1. In sustaining the respondent's defense of illegality;

2. In holding that the contracts sued upon are rendered unenforceable in this action by the Sherman Anti-Trust Act;

3. In holding that the contracts sued upon are illegal and void in their entirety; and

4. In failing to correctly apply the decision in the *Paramount* case (Appendix C; 34 F. (2d) 984, aff'd 282 U. S. 30).

ARGUMENT

The contractual provisions upon which this action is based are not rendered unenforceable by the Sherman Anti-Trust Act.

The Minnesota courts recognized that the only terms of the contracts here involved which were in themselves illegal were contained in the provisions for compulsory arbitration. While respondent's amended answer (R. 9-21) contained allegations of illegality broad enough to cover other provisions of the contract, these were not sustained. The only evidence in the case consisted of the two contracts in suit (Exs. A and B, R. 75, 76, reprinted for convenience in Appendix A of this brief), a stipulation of facts (R. 21-24) and some wholly inconsequential testimony on the part of the respondent (R. 25-49). The stipulated facts bearing on the question of illegality (R. 22-24) were confined to admissions that the printed portion of each of the contracts in suit is substantially the same as the contract construed in the *Paramount* case (par. 4), that Paragraph 18 in each of the contracts in suit is the same as Paragraph 18 in the contract construed in the *Paramount* case, and that "said Paragraph 18 was held by said decisions to be illegal and unenforceable" (par. 5), that the president of an unincorporated association of which respondent was a member participated to the extent described in the adoption of the Standard Exhibition Contract and that this association ratified the agreement to use it, and "that the adoption, ratification and use of said contract as in this paragraph set forth was secured by the means and in the manner set forth in the decision" of

this Court in the *Paramount* case (par. 8). The trial court found these facts (Findings Nos. XI, XII, XV, XVI, XVIII, R. 55, 68-70). He included (No. XIII, R. 55-56) a conclusion in the guise of a finding of fact that "the provisions in said contracts with regard to arbitration are not divisible covenants, but form an essential part of the consideration for the making of said contracts, and that without such arbitration clause, it is doubtful if said contracts would have been made; that the said illegal arbitration provisions the said contracts contained, rendered the entire contracts illegal and void".*

The Supreme Court of Minnesota "interpreted" the decree in the *Paramount* case as declaring "not only the arbitration clause illegal but the whole of the contract" (R. 81). The chief question before this Court is, therefore, the correct interpretation of the *Paramount* case.

The petitioner contends:

(1) That the decree in the *Paramount* case declared illegal only the provisions of the contracts which imposed upon exhibitors a system of compulsory arbitration of disputes, and affirmatively provided for the enforcement of the terms of the contract expressing the reciprocal engagements of the parties for licensing of, and taking and paying for, motion picture films;

(2) That, even apart from the intention manifested by that decree, the illegal features of the contracts are sev-

*This so-called finding of fact, which is intermingled with and dependent upon the ultimate federal question in the case, is of course not conclusive upon this Court in any way. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591-594; *Stanley* v. *Schwalby*, 162 U. S. 255; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593; *Truax* v. *Corrigan*, 257 U. S. 312, 324-325.

erable and do not vitiate the legal part or prevent its enforcement;

(3) That enforcement of the part of the contract relating to licensing of, and taking and paying for, films will not contravene the Sherman Act within the decisions of this Court.

1. *The Paramount case.*

The "conspiracy" condemned in the *Paramount* case was one "to coerce and to require" exhibitors of motion picture films: (1) "to submit to arbitration" disputes arising under the Standard Exhibition Contracts; (2) to "surrender and to waive" their rights to have such disputes "settled and determined" by any court; and (3) "to comply with any award" rendered in any arbitration proceeding without recourse or appeal to the courts (Extract from petition, Appendix B, *infra*, pp. 59-60). The Standard Exhibition Contract in itself was not condemned. The understanding and agreement between the defendant distributors to refuse to enter into any licensing contract except on the terms agreed upon by them, or to supply films to any exhibitor "having a contract therefor", in the event of failure of the exhibitor to comply with such terms and conditions, was attacked only because it was a means adopted by the distributors "to carry out and to accomplish the aforesaid purposes and objects" (*id.*, p. 60). Section I of the decree, adjudging that "the agreement of the defendants to adopt and to use exclusively in contracting with exhibitors of motion pictures" the Standard Exhibition Contract, "the adoption by the defendants of the Rules of Arbitration", and "all the activities and agreements of

said defendants by means of which they have collectively coerced adoption and compliance with" the Standard Exhibition Contract and Rules of Arbitration, "constitute a conspiracy" in violation of the Sherman Act (Appendix C, *infra*, pp. 61-62), is consonant with the definition of the conspiracy in the Government's petition as above stated.

Accordingly the decree in Section II, providing the injunctions, bore only upon such features of the contract as directly tended to promote the conspiracy denounced (Appendix C, *infra*, pp. 62-63). After enjoining the defendants in general terms (par. 1) from further engaging in "said conspiracy", or any similar conspiracy, or (par. 2) from doing any act for the purpose or with the effect of carrying out "the purpose of said conspiracy", the section proceeded in its subsequent paragraphs to impose specific injunctions. These related exclusively to the compulsory arbitration feature.

The defendants were enjoined from entering into any agreement "embodying the provisions of Paragraph 'Eighteenth' " of the Standard Exhibition Contract or the "Rules of Arbitration" (par. 3); from enforcing any of such provisions against "any exhibitor of motion pictures in the United States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph" (par. 4); and from doing certain specific things to compel compliance by exhibitors with such arbitration provisions of any such "existing contracts" (pars. 5, 6, 7) (Appendix C, pp. 62-63, *infra*).

Since all or practically all of the many thousand of "existing contracts" were in the standard form (see 34 F. (2d), p. 987; R. 57), the fact that the decree enjoined the distributors from enforcing paragraph Eighteenth of the "existing" contracts shows that the whole Standard Ex-

hibition Contract was not regarded as illegal but that its provisions, other than the compulsory arbitration feature, were regarded as enforceable by them just as if the illegal provisions had been deleted. If the whole Standard Exhibition Contract had been regarded as illegal, the decree would have enjoined enforcement of each of its provisions instead of enjoining enforcement of one paragraph only.

Any idea that the conduct condemned was not limited to the imposition on the trade of a system of compulsory arbitration, but was more broadly the imposition of a uniform type of license contract, is dispelled by paragraph 9 (*id.*, pp. 64-65, *infra*). That paragraph enjoins the defendants from acting upon or entering into "any understanding, arrangement, combination, conspiracy or agreement" among other things "to fix in advance any terms or conditions" upon which distributors shall enter into any licensing contract, only "if the purpose or effect" is "to coerce or require" exhibitors to submit to arbitration, waive their rights to court determination or comply with an award in arbitration proceedings.

The intention to save the provisions of the Standard Exhibition Contract expressing the mutual obligations of the parties with respect to the licensing of films appears even more strongly in Paragraph 8 of Section II. That not only contemplated continued performance of these portions of the contract, but also in effect *required* such continued performance on the part of the defendant distributors, including the petitioner. It enjoined the defendants:

> "8. From suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to

> comply with any provision of said paragraph 'Eighteenth' of said 'Standard Exhibition Contract' of May 1, 1928, or of said 'Rules of Arbitration' dated May 1, 1928, unless there be legal cause for suspending or refusing to promptly resume such service arising independently of any of the provisions of said paragraph 'Eighteenth' of said 'Standard Exhibition Contract' or of said Rule IV of said 'Rules of Arbitration'" (*id.*, pp. 63-64, *infra*).

Since the "service" which was being rendered by the distributors to the exhibitors at the time of the decree was service pursuant to the Standard Exhibition Contract, the decree by enjoining the distributors from suspending such service in effect required the distributors to continue to perform such contract. This is shown also by Paragraph 9 which enjoined the defendants, under certain conditions, from continuing to act upon any agreement to require the deposit of security as a condition for "continuing to perform any such contract which has not been breached by the exhibitor" (*id.*, pp. 64-65, *infra*).

Read in the light of the specific provisions of Section II of the decree above referred to, the meaning of Section III is plain. It reads:

> "Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree" (*id.*, p. 65, *infra*).

Paragraph 8 of Section II provided that the licensing features of the contract are enforceable against the

distributors. The corollary that they are also enforceable against the exhibitors is implicit therein. But Section III is an express provision to that effect. Since the contractual obligations between the distributors and the exhibitors were those contained in the Standard Exhibition Contract, the quoted clause amounts to a reservation of the rights of the distributors to continue performance *and enforcement* of the provisions of that contract other than the compulsory arbitration provisions.

The foregoing analysis of the decree in the *Paramount* case shows, we submit, that it is an adjudication that, except for the coercive arbitration feature, the Standard Exhibition Contract is legal, and is enforceable by either party. This Court, affirming that decree, termed it an "appropriate" injunction against future action under the unlawful plan (282 U. S. pp. 41-42). It follows that the decision of the Minnesota courts that the contracts sued upon are illegal in their entirety and unenforceable finds no support in the decision in the *Paramount* case, but is in conflict with it.

2. *The question of severability*

By holding the Standard Exhibition Contract enforceable, except for the compulsory arbitration provisions, the decision in the *Paramount* case necessarily held, we submit, that such provisions are severable. This was pointed out by the Circuit Court of Appeals for the Fourth Circuit in *Paramount Famous Lasky Corp.* v. *National Theatre Corp.*, 49 F. (2d) 64, where, in holding that the distributor could sue upon the contract notwithstanding the illegality in the arbitration clause, it said, at page 66:

> "Again we think that the learned judge below was in error for another reason, and that is that the contract, as far as is related to the lawful and unlawful parts, was divisible. That this was the opinion of Judge Thacher, in the case of *United States* v. *Paramount Famous Lasky Corporation, supra,* is shown by the excerpt from his decree."

But quite apart from the effect of the *Paramount* case, the illegal provisions of this contract are severable from the legal ones according to principles of general law, and do not "taint" the whole.

A contract is not necessarily illegal in its entirety because it contains an illegal arbitration provision (see, *e.g., Saratoga State Waters Corp.* v. *Pratt,* 227 N. Y. 429, 125 N. E. 834; *Johnston* v. *Franklin Kirk Co.,* 83 Ind. App. 519, 148 N. E. 177; *St. Louis, I. M. & S. Ry. Co.* v. *Mathews,* 64 Ark. 398, 42 S. W. 902), or an illegal provision in restraint of trade (see, *e.g., Oregon Steam Navigation Co.* v. *Winsor,* 20 Wall. 64; *Western Union Telegraph Co.* v. *Pennsylvania Co.,* 129 Fed. 849, 867, 868 (C. C. A., 3rd Circ.); *Price* v. *Greene,* 16 M. & W. 346 (Exchequer Chamber 1847). Relying upon numerous cases involving illegal arbitration provisions or illegal restraints of trade, the Circuit Court of Appeals for the Fourth Circuit and the Supreme Court of Utah, in sustaining actions by distributors upon the Standard Exhibition Contract, held that the illegal arbitration provisions are severable and do not vitiate the entire contract. *Paramount Famous Lasky Corporation* v. *National Theatre Corporation* and *Fox Film Corporation* v. *Ogden Theatre Co., Inc., supra.* The former court said (49 F. (2d), p. 66):

"* * * That such a provision, as the one in question here, is separable from the rest of the contract, is borne out by a number of decisions. [Citations]"

* * * * * * * *

"It has been expressly held that, where agreements in restraint of trade were unlawful in part, they were enforceable as to the parts that were not unlawful, and this holding runs back to the earliest authorities. [Citations]"

The latter court said (17 P. (2d), p. 297):

"Arbitration provisions in contracts are very generally held to be severable from the body of the contract. Arbitration provisions of the kind in question, that is, those types that are in no wise connected with the promises each party makes to the other, but which on the contrary look to the future and provide a method of arbitrating disputes that may arise, are by practically all courts held to be severable provisions. In fact an arbitration provision as to disputes that may arise in the future is treated as if it were a separate contract in and of itself. [Citations] An agreement in a contract to arbitrate disputes that may arise is not a part of the substance of the contract. It pertains to remedy only, and is collateral to the contractual matters. The contract was not made for the purpose of bringing about the arbitration. [Citations] In fact every decision that holds invalid the provision that arbitration is a condition precedent to commencing an action impliedly holds the provisions severable, not a part of the consideration and not of the gist of the contract. *Blodgett Co.* v. *Bebe Co.*, 190 Cal. 665, 214 P. 38, 26 A. L. R. 1070.

* * * * * * * *

> "Provisions in restraint of trade are held by most courts to be severable from the body of the contract and no bar to enforcement of the remaining portion of the agreement, especially in cases where one party has obtained the benefits of performance by the other. There are cases in which contractual provisions that are felonious or *malum in se* may invalidate the whole contract, but the provision at bar is not in that category. It is, however, a provision that is tainted with evil design and deserves no praise. But it is clearly severable, and we are of the opinion that it comes within the rules laid down by a great majority of the decisions concerning similar provisions. [Citations]"

The illegal portion of a partly illegal bilateral contract is severable and the legal portion is enforceable where legal promises on two sides are apportioned to one another and the illegal portion does not go to the essence of the bargain. See 3 *Williston, Contracts,* §§ 1782, 1780; *American Law Institute, Restatement of the Law of Contracts,* § 607. The test of severability is concisely stated in Section 1782 of *Williston* as follows:

> "If the legal portion of a bilateral contract is severable, legal promises on one side being wholly supported by legal promises on the other, and the illegal portion of the contract does not go to its essence, the legal part may be enforced."

and in the "Comment" under Section 607 of the *Restatement* as follows:

> "If the legal portion of a bilateral bargain is severable, legal promises on two sides being apportioned to one another, and the illegal portion of the

bargain does not go to its essence, the legal part may be enforced."

Application to the Standard Exhibition Contract of the test of severability stated above demonstrates that the illegal arbitration provisions are severable and the provisions upon which this action is based are enforceable, for it is clear on the face of the contract that the legal promises on one side are wholly supported by legal promises on the other and that the illegal portion of the contract does not go to its essence.

The contract is primarily one licensing the exhibition of motion picture films (see pars. Second and Twenty-second). The primary promise on the part of the distributor is to grant the license and deliver the stipulated films (see pars. Second and Seventh). The primary promise on the part of the exhibitor is to exhibit the films and "to pay for such license" the stipulated sums (see pars. Third, Fourth and Fifth). There is nothing illegal in these promises. The object of the distributor is to receive the sums stipulated as payment "for such license" and the object of the exhibitor is to obtain the license for which he promises to pay such sums (see pars. Second, Fourth and Fifth). There is nothing illegal in these objects.

The legal promises on one side of the contract with respect to the licensing of, and taking and paying for, films are wholly supported by legal promises on the other. Paragraph Eighteenth, the clause involved in the *Paramount* case, contains a complete set of reciprocal obligations which could have been substantially written as a complete separate contract with equal effect. It imposes reciprocal obligations to submit to and abide by the results of arbitration, couched in the language of mutual promises. The form

and content of the paragraph show clearly that the promises of the parties with respect to arbitration are "apportioned to one another". It necessarily follows that the legal promises with respect to the licensing of films are similarly apportioned.

The arbitration provisions do not go to the essence of the contract. In the normal operation of the contract its objects would be completely attained without their aid. These provisions have no direct bearing upon these objects. They do not enlarge the substantial scope of the contract. They do not create substantive rights. They provide merely a means of enforcing the substantive rights and are to be invoked only in case of dispute. Their deletion does not affect the substantive rights but merely leaves such rights subject to enforcement by the ordinary means provided by law.

Nothing in the opinion of the Minnesota court indicates any doubt that in the Standard Exhibition Contract the legal promises on the one side with respect to the licensing of, and taking and paying for, films are wholly supported by legal promises on the other. The sole ground upon which the court rested its conclusion of the indivisibility of the contract was that the circumstances indicated that the compulsory arbitration feature was regarded by the distributors as very important and was strongly desired by them, and therefore must be regarded as of the essence of the contract. But this is not the test. As we have above pointed out, the essence of the contract is embraced in its licensing feature.

For present purposes, however, it is only necessary to say that all of the reasons assigned by the Minnesota court (R. 82-83) relate to the importance which the *distributors* are assumed to have attached to the compulsory arbitration

feature. The argument amounts to saying that a party may not sue on one promise, performance of which would be wholly legal, because *he* is not entitled to get another advantage which another term of the contract purported to give him. A very similar contention was disposed of by this Court in *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179. There the plaintiff sued to recover an instalment of the purchase price due under a contract for the sale of certain vessels to the defendant. The defendant relied upon a covenant on its own part, to maintain the same rates as those charged by the plaintiff, as making the contracts illegal as in restraint of trade (p. 183). In holding the defense insufficient, this Court said, at pages 185-186:

> "It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into consideration for that which was the consideration of his debt and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *Bank of Australasia* v. *Breillat*, 6 Moore, P.C. 152, 201; *Pigot's Case*, 11 Co. Rep. 26*b*, 27*b*. The plaintiff in error did business between Cincinnati and Syracuse, Ohio, and the rates referred to must be assumed to be rates within those points. If the covenant had any indirect bearing on commerce with another State, what we have said sufficiently explains why we

deem it insufficient to make the whole agreement void."

In *Nutt* v. *Knut*, 200 U. S. 12, the plaintiff, an attorney, sued to recover a contingent fee under a retainer contract by which he was retained to prosecute a claim against the United States and was given a right to a fee equal to 33⅓% of the amount allowed on the claim and also a right to a lien upon the claim. The defendant interposed a defense to the effect that the contract was null and void under section 3477 of the Revised Statutes which declares "null and void all transfers and assignments of a claim upon the United States". This Court held that the provision giving the plaintiff a lien was within the scope of the statute and therefore bad, but nevertheless held the defense insufficient, saying, at page 21:

> "* * * There is a provision in the contract of 1882 which can stand alone and which was not in violation of the statute, namely, the one evidencing an agreement on the part of Nutt's executrix to pay to the attorney for his services a sum equal to 33⅓ per cent of the amount allowed on the claim. *Wylie* v. *Cox*, 15 How. 415; *Wright* v. *Tebbitts*, 91 U. S. 252; *Taylor* v. *Bemiss*, 110 U. S. 42. Such an agreement did not give the attorney any interest or share in the claim itself nor any interest in the particular money paid over to the claimant by the Government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation. It simply created a legal obligation upon the part of the estate, which, if not recognized after the collection of the money, could

> have been enforced by suit for the benefit of the attorney, without doing violence to the statute or to the public policy established by its provisions.* * *"

3. Enforceability, under the decisions of this Court, of the severable provisions sued upon.

Since the illegal arbitration provisions of the Standard Exhibition Contract are severable, the remainder of the contract is enforceable unless its enforcement will contravene the Sherman Anti-Trust Act under the decisions of this Court.

The combination which was held to violate the Sherman Anti-Trust Act in the *Paramount* case was a combination of distributors for the purpose of imposing compulsory arbitration upon the exhibitors. The only provisions of the Standard Exhibition Contract which contributed to the accomplishment of this purpose are the compulsory arbitration provisions. The Standard Exhibition Contract is not the arrangement by which the combination came into existence, but is merely collateral to such arrangement (Appendix C, Sec. I, pp. 61-62, *infra*.). There is no necessary connection between the provisions sought to be enforced in this action and such arrangement, and the enforcement of such provisions will have no tendency to accomplish the purpose of the combination.

The decisions of this Court show that under such circumstances the Sherman Anti-Trust Act affords no defense to an action upon contract. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165; *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248.

In *Connolly* v. *Union Sewer Pipe Co., supra,* this Court sustained a judgment for the price of sewer pipe sold and delivered, notwithstanding the fact that the plaintiff was an illegal combination organized for the purpose of preventing competition in the manufacture and sale of sewer pipe and limiting the production of and increasing and controlling the wholesale and retail price of the product, and the fact that the combination was acting for such purpose in making the sales upon which the action was founded. In the majority opinion this Court said, at page 551:

> "The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

In *Wilder Manufacturing Co.* v. *Corn Products Refining Co., supra,* this Court affirmed a judgment for the price of glucose sold and delivered by a combination which was assumed to have been illegally organized with the

object of monopolizing all dealings in the product, and to have unreasonably advanced the price of the product to the injury of the public and to have driven competitors out of the field by means of an offer to customers of a percentage of profits upon the condition of their dealing exclusively with it. This Court apparently assumed that this condition was a condition of the contract of sale. It nevertheless held the contract of sale to be legal and the obligation to pay the purchase price enforceable.

In *Small Co. v. Lamborn & Co., supra*, this Court affirmed a judgment for the difference between the contract price of sugar which the defendant had contracted for and refused to accept and the amount obtained by the plaintiff upon resale, notwithstanding the facts that the plaintiff and others had entered into an illegal combination to manipulate trade in refined sugar with a view to increasing the price, that the contracts sued upon were made during the life of the combination and that the plaintiff conformed the terms of sale to the standards sanctioned by the combination.

The Supreme Court of Minnesota relied (R. 83) upon *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227, in which this Court, by a divided vote, affirmed a judgment which denied recovery by the representative of an illegal combination for the price of wall paper sold and delivered to a dealer. But that case is clearly distinguishable. There, not only was the purpose of the combination to monopolize and prevent competition in the manufacture and sale of, limit the production of and increase the wholesale and retail price of a product; but the

very agreement sued upon was a part of the illegal plan. It obligated the dealer to buy from no one but members of the combination and to refrain from selling to others at less than scheduled prices under penalty of being unable to buy wall paper and being driven out of business. It was admitted on demurrer that "the immediate, intended and direct effect of the said combination and agreements was the stifling of competition between said manufacturers and vendors of wall paper, and between the jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one-half more than the price which it would be had the same been left to free and unrestrained competition" (p. 250), and that the prices sued for were "the prices fixed and determined in pursuance of and by the combination" and were "unreasonable, unjust and excessive and at least one-half more than they would otherwise have been" and "above the fair market price of such merchandise by more than the amount sought to be recovered" (pp. 251, 253). In the majority opinion of this Court it was concluded that the plaintiff, representing an illegal combination, could not have a judgment for the amount of the account sued on "because, for the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination" (pp. 266-267). The principal reasons for this conclusion were thus stated in the opinion:

> "If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination.
>
> * * * * * * *

> "Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends." (pp. 261-262)

In the *Wilder* case, *supra*, this Court approved the ruling in the *Connolly* case and, in distinguishing the ruling in the *Continental Wall Paper* case, said (236 U. S. p. 177) that that case

> "* * * was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (*a*) the relations of the contracting parties to the goods sold, (*b*) the want of real ownership in the seller, (*c*) the peculiar obligations which were imposed upon the buyer, and (*d*) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale".

The *Continental Wall Paper* case held merely that enforcement of a contract will be denied where it would aid an illegal combination "to accomplish forbidden ends." The enforcement of the contract involved in the present case will obviously not accomplish or have any tendency to promote the "forbidden ends" of the combination which was condemned in the *Paramount* case.

CONCLUSION

The judgment below should be reversed, and the petitioner should be adjudged entitled to recover the sum of $1,838.42 with interest and costs and disbursements in accordance with the stipulation of facts (R. 23, fol. 68).

Respectfully submitted,

JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

CHARLES E. HUGHES, JR.,
Of Counsel.

APPENDIX A

Contracts Sued Upon

Plaintiff's Exhibit A

PAGE ONE

AGREEMENT, made in one or more counterparts between FOX FILM CORPORATION, a corporation (hereinafter referred to as "the Distributor"), party of the first part, and the Exhibitor hereinafter named and referred to as the "Exhibitor," operating the theatre or theatres hereinafter designated, party of the second part,

WITNESSETH: The parties hereto agree as follows:

Warranty as to Form

FIRST: The Distributor warrants that there is contained herein all of the numbered Articles of the "Standard Exhibition Contract" agreed upon by the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference (an authenticated copy of which has been filed with the American Arbitration Association). The Distributor also warrants that any clauses in addition thereto appearing upon the Schedule have been approved by such Contract Committee, and that any additional clauses appearing upon a Rider, if any hereto annexed, are not inconsistent with any of such numbered Articles. It is agreed that any clauses contained in such Rider shall be of no effect unless such Rider be signed by the Exhibitor. It is agreed that any agreement contained in the Schedule covering or describing what photoplays are licensed hereunder and in respect of any license fee, exhibition dates and any provision permitted by the provisions of the numbered Articles hereof shall not be deemed an additional clause for the purposes of this Article.

License

SECOND: (a) The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the Schedule herein subject to the terms and conditions hereinafter stated to exhibit (during the period of one year commencing with the date fixed or determined as hereinafter provided for the exhibition in the theatre hereinafter designated of the first photoplay deliverable hereunder, unless otherwise in the Schedule provided) each of such photoplays at the said theatre only for the number of successive days in the said Schedule provided. If more than one theatre is hereinafter designated no photoplay is licensed hereunder for exhibition at more than one of such theatres unless otherwise specifically agreed upon in the Schedule.

(b) In case any of such photoplays (except photoplays which shall be "roadshown") shall not be "generally released" by the Distributor for distribution in the United States during the period beginning August 19, 1928 and ending August 17, 1929, such photoplays shall be excepted and excluded from this license unless the Exhibitor shall give written notice to the Distributor not later than thirty days after such last mentioned date that the Exhibitor elects to exhibit all of such photoplays hereunder. If such notice be given the Distributor shall deliver and the Exhibitor shall exhibit such photoplays as and when available for exhibition hereunder, except that any of such photoplays not so "generally released" within two years after such last mentioned date shall be also excepted and excluded. The Distributor may exhibit or license the exhibition of any photoplays excepted and excluded as aforesaid when and where desired by the Distributor, and all claims or causes of action in respect thereof are hereby expressly waived by the Exhibitor.

Time and Place of Exhibition

THIRD: The Exhibitor agrees to exhibit under said license said photoplays, but only at the theatre hereinafter specified, on the exhibition date or dates fixed in the Schedule or determined as hereinafter provided, and not to allow any positive print thereof to leave the Exhibitor's possession during the period specified for the exhibition thereof by the Exhibitor, nor to exhibit or to permit the exhibition of any such positive print at any other time or place. Such license shall be specifically for such exhibition of such photoplays, and for no other purpose.

Payment

FOURTH: The Exhibitor agrees to pay for such license as to each of such photoplays the fixed sums herein specified at least three (3) days in advance of the date of shipment from the Distributor's Exchange or from the last previous exhibitor of the positive print thereof.

Payment on Account

FIFTH: Payment, if any, made upon the execution hereof by the Exhibitor shall be deemed payment on account of the sums last payable hereunder.

Protection and Run

SIXTH: During the life of this contract the Distributor agrees not to exhibit or license the exhibition of any such photoplays in conflict with the "run" or "protection period," if any, in the Schedule specified. Unless otherwise provided herein, such "protection period" shall be computed from the last date of exhibition of each photoplay as fixed herein. If "protection" is granted hereunder against a specified theatre or theatres which "protection" shall indicate that it was the intention of the Distributor to grant such "protection" against all of the theatres in the immediate neighborhood or vicinity of the Exhibitor's theatre, then, unless otherwise

provided in the Schedule, such "protection" shall be deemed to apply to and include any theatre that may hereafter be opened in such neighborhood or vicinity.

Delivery and Return of Prints

SEVENTH: The Distributor agrees to deliver to the Exhibitor during the period specified in Article Second hereof or otherwise in the Schedule provided for a positive print suitable for exhibition of each of such photoplays for exhibition at the said theatre on the dates specified or on the dates determined as herein provided. Delivery of such positive prints by the Distributor to the Exhibitor at the Distributor's exchange or to a common carrier or to the United States postal authorities for mailing or to any agent of the Exhibitor shall be deemed delivery by the Distributor to the Exhibitor hereunder.

All deliveries other than at the Distributor's exchange shall be made in time to enable the carrier thereof in accordance with the carrier's time schedule to deliver to the Exhibitor or at the place where the Exhibitor's theatre is located prints at least one hour before the usual time for the opening of the Exhibitor's theatre.

The Exhibitor agrees to return each positive print received by the Exhibitor hereunder, with the reels and containers furnished therewith, to the exchange of the Distributor from which the Exhibitor is served or as otherwise directed by the Distributor immediately after the last exhibition of such positive print, in the same condition as when received by the Exhibitor, reasonable wear and tear due to the proper use thereof excepted. The Exhibitor agrees to pay all costs of transportation of such positive prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of any of such positive prints (as the case may be) and return to the Distributor's exchange; or if directed by the Distributor, to ship such positive prints elsewhere than to the Distributor's exchange transportation charges collect. It is agreed that

the delivery of a positive print properly directed and packed in the container furnished by the Distributor therefor, to a carrier designated or used by the Distributor and proper receipt therefor obtained by the Exhibitor, shall constitute the return of such positive print by the Exhibitor.

If the Exhibitor fails to or delays the return of any positive print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor the Exhibitor agrees to pay the Distributor the damage, if any, so caused the Distributor and in addition the damage, if any, so caused such other exhibitor as shall be determined by Arbitration as provided for in Article Eighteenth hereof.

Selection or Designation of Play Dates

EIGHTH: The exhibition date or dates of each photoplay, unless definitely specified or otherwise provided for in the Schedule, or otherwise agreed upon, shall be determined as follows:

1. The Distributor shall mail to the Exhibitor at least fifteen days' notice in writing of the date upon which each photoplay will be available for exhibition by the Exhibitor, consistent with prior runs and/or protection heretofore or hereafter granted to other exhibitors (which date is hereinafter referred to as "the available date"). Such notice shall be of no effect unless prints of such photoplay are in the exchange of the Distributor from which the Exhibitor is served.

2. Within fourteen days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates within a thirty day period commencing with such available date, by giving written notice to the Distributor of the date, or dates, so selected.

If the exhibition date or dates so selected by the Exhibitor, are not open for the Exhibitor, then the exhibition date

or dates shall be designated as provided in the following paragraphs "A" and "B":

(A) If other dates within said thirty day period are open the Exhibitor shall immediately select from such other open dates another date or other dates, failing to do so, then the Distributor shall designate the date or dates which shall be within a period not earlier than two weeks nor later than six weeks from the date first selected by the Exhibitor, by mailing fourteen days' notice thereof to the Exhibitor.

(B) If no other date or dates within said thirty day period are open (after the Exhibitor's written request therefor) then the Exhibitor shall designate the date or dates which shall be within a period not earlier than two, nor later than six weeks from the last date of the said thirty day period, by immediately giving written notice thereof to the Distributor. If the Exhibitor fails to immediately designate such date or dates, as provided in this paragraph "B", the Distributor shall designate the date or dates within the same period by mailing to the Exhibitor fourteen days' notice of such date or dates.

If the Exhibitor fails to make any selection within fourteen days after the mailing of the available dates of any photoplay, then the Distributor may at any time designate the exhibition date or dates thereof, which date shall not be prior to the available date, by mailing notice thereof at least fourteen days before such exhibition date or dates; and if any such photoplay shall have been exhibited by any other exhibitor having a "run" prior in point of time and immediately preceding the "run" specified in the Schedule granted to the Exhibitor, then the Distributor shall designate the exhibition date or dates thereof, which shall be within a period of forty-five days commencing with the available date. In case the exhibition date or dates of any of the photoplays shall be designated by the Distributor pursuant to this paragraph, "the period of protection," if any, specified

in the schedule, shall begin upon the fifteenth (15th) day of the thirty day period specified in paragraph 2 of this Article.

3. The exhibition date or dates of any of the photoplays selected by the Exhibitor (if available), or designated as in this Article Eighth provided, or otherwise agreed upon between the Distributor and the Exhibitor, shall be for all purposes the exhibition date or dates of such photoplay as though definitely specified in the Schedule.

4. In case this contract embraces a series of feature photoplays, five reels or more in length and featuring a particular star or director, the Exhibitor shall not be required hereunder to exhibit more than one photoplay of any such series every five weeks.

Loss of and Damage to Prints

NINTH: The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange for each linear foot of any positive print lost, stolen or destroyed or injured in any way in the interval between the delivery thereof by the Distributor and the return thereof by the Exhibitor in full settlement of all claims for such loss, theft, destruction or injury. Such payment, however, shall not transfer title to or any interest in any such positive print to the Exhibitor or any other party, nor release the Exhibitor from liability arising out of any breach of this contract. The Distributor shall at the option of the Exhibitor repay or credit to the Exhibitor any sums paid by the latter for lost or stolen prints, excepting "news reels," upon their return to the Distributor within sixty (60) days after the date when the same should have been returned hereunder. The Exhibitor shall not be liable for the damage or destruction of any positive print, provided the Exhibitor establishes such damage or destruction occurred while in transit from the Exhibitor. The Exhibitor

shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any positive print. If any positive print shall be received from the Exhibitor by the Distributor or any subsequent exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, prior to the second public exhibition thereof shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, and setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

Description and Titles of Photoplays—Reissues

TENTH: The Exhibitor shall not be required to accept for any photoplay described in the Schedule as the photoplay of a star, or of a director, or based upon a specified story, book, or play, or by an identifying description, any other photoplay of a different star or different director, or based upon a different story, book or play, or not corresponding to such identifying description, as the case may be. Nothing herein contained shall limit the right of the Distributor to change the title of any of such photoplays, or, as respects any photoplay based upon any story, book or play, prevent the making of any alterations, changes in or adaptations thereof.

The Distributor warrants that none of the photoplays licensed hereunder are reissues from old negatives or old negatives renamed, except those specifically set forth as such in the Schedule.

Assignment Upon Sale of Theatre

ELEVENTH: This contract shall not be assigned by either party without the written acceptance of the assignee and the written consent of the other party; *provided*, that if the Exhibitor sells or disposes of his interest in the

theatre hereinafter specified, he may assign this contract to the purchaser of such interest without the written consent of the Distributor and such assignment shall become effective upon the written acceptance thereof by the assignee; such assignment, however, shall not relieve the Exhibitor of liability hereunder, unless the Distributor consents in writing to release the Exhibitor from such liability.

Exhibition and Advertising

TWELFTH: The Exhibitor agrees to run photoplays (excepting "news reels") as delivered without alteration, excepting with the written or telegraphic approval of the Distributor, subject to requirements of duly authorized public authorities necessitating any change. The Exhibitor also agrees to advertise and announce each photoplay as "A Fox Movietone, Sound and Dialogue Production." In all newspaper advertising and publicity issued by the Exhibitor relating to said photoplays the Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by the Distributor.

All advertising accessories used by the Exhibitor in connection with the exhibition of said photoplays must be leased from or through the Distributor and must not be sold, leased or given away by the Exhibitor.

Unless this contract expressly provides for the "first run" in the City or Town wherein the theatre hereinafter specified is located, the Exhibitor agrees not to advertise any of the photoplays herein provided for by means of lithographs, slides, trailers, lobby displays, newspaper announcements, advertising or otherwise prior to, and until after the completion of, the exhibition of such photoplay by any other exhibitor having the right of the "first run" thereof in said City or Town.

The Distributor shall not in any wise be liable for any breach of the provisions of the immediately preceding paragraph contained in any other "Standard Exhibition Contract" with any other exhibitor.

Warranty as to Advertising

THIRTEENTH: The Distributor warrants that the photoplays herein provided for will not contain any advertising matter for which compensation is received by the Distributor.

Taxes

FOURTEENTH: The Exhibitor agrees to pay to the Distributor upon demand any tax, fee or other like charge now and/or hereafter imposed or based upon the delivery and/or the exhibition of positive prints of the photoplays and/or upon the sums payable under this contract by the Exhibitor to the Distributor. If under any statute or ordinance any such tax, fee or other like charge is or shall be payable or paid by the Distributor and the exact amount payable hereunder by the Exhibitor is not therein definitely fixed or cannot be exactly determined then the Exhibitor agrees to pay such part of any such tax, fee or other like charge, paid or payable by the Distributor as shall be fixed in the manner determined by the then President of the American Arbitration Association.

Minimum Admission Charge

FIFTEENTH: The Exhibitor warrants and agrees that during the period each of the photoplays herein provided for shall be exhibited in said theatre the Exhibitor will charge for admission to said theatre an actual admission fee which shall not be less than ten cents, unless a greater minimum admission charge is herein elsewhere specified, for each exhibition and that such photoplays shall not be exhibited unless such admission fee is charged.

Delay in or Prevention of Performance

SIXTEENTH: In case the Exhibitor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason

of censor rulings, the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity or order of any Court of competent jurisdiction then such delay or failure of performance with respect to such photoplay shall be excused and all claims or causes of action for damages therefor, or arising therefrom, are hereby expressly waived by the Distributor. In any such event, the time of the Exhibitor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, unless performance thereof because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Exhibitor with respect to any such photoplay shall be waived. The resumption of performance by the Exhibitor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance, *provided*, that if such delay and/or prevention of performance, caused as aforesaid, shall continue for a period of three (3) months either party hereto may cancel this contract, but only with respect to any such photoplay the exhibition hereunder of which has been so delayed or prevented, by sending after the expiration of such three (3) months' period to the other party notice in writing to such effect.

In case the Distributor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity, Court orders, censor rulings, delays of any common carrier, or of the United States Postal authorities, delays in production or failure of the producers of any of such photoplays to make or deliver them to the Distributor or of any star or other performer to appear therein in time for delivery as herein provided, then such delay in or prevention of performance shall be excused and all claims or causes of action for damages therefor or arising therefrom are hereby expressly waived by the Exhibitor.

In any such event, the time of the Distributor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, provided, however, that in case any such delay or prevention shall prevent the Distributor from "generally releasing" any such photoplay during the period specified in paragraph (b) of Article Second, the provisions of such paragraph shall govern, unless performance because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Distributor with respect to any such photoplay shall be waived. The resumption of performance by the Distributor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance and the Distributor shall deliver to the Exhibitor any such photoplay at the earliest available date thereafter, and such delivery in any such case shall be with the same force and effect as though delivery took place within the period herein above limited and the Exhibitor agrees to accept, pay for and exhibit any such photoplay at such later period pursuant to the terms hereof.

Waiver

SEVENTEENTH: The waiver by either party of any breach or default by the other party shall not be construed as a waiver of any other or subsequent breach or default by such other party.

Arbitration

EIGHTEENTH: The parties hereto agree that before either of them shall resort to any court to determine, enforce or protect the legal rights of either hereunder, each shall submit to the Board of Arbitration (established or constituted pursuant to the Rules of Arbitration filed with the American Arbitration Association, 342 Madison Avenue, New York City, bearing date May 1, 1928, and identified by the signatures of the Contract Committee

appointed at the 1927 Motion Picture Trade Practice Conference, a copy of which will be furnished to the Exhibitor upon request) in the city wherein is situated the exchange of the Distributor from which the Exhibitor is served or if there be no such Board of Arbitration in such city then to the Board of Arbitration in the city nearest thereto (unless the parties hereto agree in writing that such submission shall be made to a Board of Arbitration located in another specified city), all claims and controversies arising hereunder for determination pursuant to the said Rules of Arbitration and the rules of procedure and practice adopted by such Board of Arbitration.

The parties hereto further agree to abide by and forthwith comply with any decision and award of such Board of Arbitration in any such arbitration proceeding, and agree and consent that any such decision or award shall be enforceable in or by any court of competent jurisdiction pursuant to the laws of such jurisdiction now or hereafter in force; and each party hereto hereby waives the right of trial by jury upon any issue arising under this contract, and agrees to accept as conclusive the finding of fact made by any such Board of Arbitration, and consents to the introduction of such findings in evidence in any judicial proceeding.

In the event that the Exhibitor shall fail or refuse to consent to submit to arbitration any claim or controversy arising under this or any other Standard Exhibition Contract which the Exhibitor may have with the Distributor or any other distributor or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, the Distributor may, at its option, demand, for its protection and as security for the performance by the Exhibitor of this and all other existing contracts between the parties hereto, payment by the Exhibitor of an additional sum not exceeding $500 under each existing contract, such sum

to be retained by the Distributor until the complete performance of all such contracts and then applied, at the option of the Distributor, against any sums finally due or against any damages determined by said Board of Arbitration to be due to the Distributor, the balance, if any, to be returned to the Exhibitor; and in the event of the Exhibitor's failure to pay such additional sum within seven (7) days after demand, the Distributor may by written notice to the Exhibitor suspend service hereunder until said sum shall be paid and/or terminate this contract.

In the event that the Distributor shall fail or refuse to consent to the submission to arbitration of any claim or controversey arising under this or any other Standard Exhibition Contract providing for arbitration which the Distributor may have with the Exhibitor, or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, within the number of days specified in Article Twenty-second opposite the name of the City in which such Board of Arbitration is located, the Exhibitor may at his option terminate this and any other existing contract between the Exhibitor and the Distributor by mailing notice by registered mail within two (2) weeks after such failure or refusal, and in addition, the Distributor shall not be entitled to redress from such Board of Arbitration upon any claim or claims against any exhibitor until the Distributor shall have complied with such decision, and in the meanwhile the provisions of the first paragraph of this Article Eighteenth shall not apply to any such claim or claims.

Any such termination by either party, however, shall be without prejudice to any other right or remedy which the party so terminating may have by reason of any such breach of contract by the other party.

The provisions of this contract relating to arbitration shall be construed according to the law of the State of New York.

Verbal Promises: Representation

NINETEENTH: *This contract is complete and no promises or representations have been made by either party to the other except as set forth herein.*

Option to Exclude if Group Licensed

TWENTIETH: If the license herein granted shall apply to an entire group of feature photoplays offered by the Distributor to the Exhibitor at one time, and not otherwise, the Exhibitor shall have the right to exclude from this contract up to but not exceeding ten per cent of the total number of such photoplays, but only if the Exhibitor shall give the Distributor written notice to such effect at any time not later than fourteen (14) days before the date fixed for the exhibition of any such photoplay hereunder, and if at the same time the Exhibitor shall pay to the Distributor one-half of the license fee payable in respect of any such photoplay. In computing such ten per cent, fractions of less than one-half shall be disregarded. If any such photoplay shall, because of such exclusion, be thereafter licensed by the Distributor for the same run as that specified in this contract, for exhibition at another theatre where such excluded photoplay would not have been exhibited if not so excluded: then one-half of the license fee (up to but not exceeding the amount paid by the Exhibitor to the Distributor as a condition of so excluding such photoplay) received by the Distributor for such re-license, shall be credited to the Exhibitor by the Distributor.

If the license fee for any such photoplay so excluded is to be computed either in whole or in part upon a percentage of gross receipts of the Exhibitor's theatre, then for the purpose of computing such one-half of such license fee payable hereunder in respect of such photoplay, such gross receipts for each day that any such photoplay is licensed hereunder for exhibition thereat shall be deemed to be the average daily gross receipts of such theatre during

the period of thirty (30) operating days immediately prior to such date of availability of such photoplay.

Racial or Religious Subject Matter

TWENTY-FIRST: If the Exhibitor shall claim that the exhibition at the theatre hereinafter specified of any photoplay licensed hereunder will be offensive to the public in the place where such theatre is located, because of racial or religious subject matter, and if the Exhibitor shall give written notice to the Distributor of such claim within a reasonable time prior to the date fixed for the Exhibition thereof hereunder such claim shall be immediately submitted to the Board of Arbitration herein specified. If such Board of Arbitration shall specifically determine that the exhibition of such photoplay at such theatre will be offensive to said public because of racial or religious subject matter, then such photoplay shall be excepted from this contract, and not otherwise. The Distributor may exhibit or license the exhibition of any photoplay so excepted when and where desired by the Distributor free from all claims of the Exhibitor.

If the Distributor shall be of the opinion that any photoplay licensed hereunder will be offensive because of racial or religious subject matter, to the public in the place where the Exhibitor's theatre is located, the Distributor shall have the right to except and exclude such photoplay from this contract, upon condition that such photoplay shall not thereafter be licensed for exhibition in such place unless such racial or religious subject matter is eliminated therefrom in which case such photoplay shall again be deemed licensed hereunder.

Acceptance of Application

TWENTY-SECOND: This instrument shall be deemed an application for a license under copyright only and shall not become binding until accepted in writing without alteration or change by an officer of or any person duly authorized by

the Distributor and notice of acceptance sent to the Exhibitor as herein provided. The deposit by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment on account of any sums payable hereunder or the delivery of a print of any of the photoplays or the furnishing of any advertising accessories shall not be deemed an acceptance hereof by the Distributor...

Unless notice of acceptance of this application by the Distributor is sent to the Exhibitor by mail or telegraph within the number of days after the date thereof hereinafter specified (immediately following the name of the city wherein is situated the exchange of the Distributor from which the Exhibitor is served, or if such city is not hereinafter named then within the number of days specified immediately following the city hereinafter named nearest thereto) said application shall be deemed withdrawn and the Distributor shall forthwith return any sums paid on account thereof by the Exhibitor. Albany 10; Atlanta 20; Boston 10; Buffalo 10; Charleston 15; Charlotte 15; Chicago 15; Cincinnati 20; Cleveland 15; Dallas 30; Denver 20; Des Moines 15; Detroit 15; Indianapolis 15; Jacksonville 15; Kansas City 15; Los Angeles 25; Little Rock 15; Louisville 15; Memphis 20; Milwaukee 15; Northern New Jersey 7; Minneapolis 20; Butte 30; New Haven 10; New Orleans 15; New York City 7; Oklahoma City 20; Omaha 20; Peoria 15; Philadelphia 10; Pittsburgh 14; Portland, Ore. 30; St. Louis 15; Salt Lake City 30; San Francisco 20; Seattle 30; Washington, D. C. 14.

This application and any application for other photoplays of the Distributor executed by the Exhibitor at the same time shall, for the purpose of this Article only, be deemed one application unless an agreement to the contrary contained in the Schedule is specifically signed by the Exhibitor.

A copy of this application, signed by the Exhibitor, shall be left with the Exhibitor at the time of signing, and

in the event of acceptance thereof as above provided, a duplicate copy, signed by the Distributor, shall be forwarded to the Exhibitor.

* DIRECTION TO SALESMEN: *While you have every right to trade among prospective customers to obtain the best offer possible for our product, after you have selected a particular exhibitor whose offer you believe to be the best obtainable and take a written application from such exhibitor, you are hereby directed to forward the application to the office of your company and make no further effort to sell the same service to any other exhibitor directly competing with such exhibitor until the application so forwarded has been duly rejected, accepted or withdrawn in accordance with its terms. A violation of this direction will subject you to discharge.*

Form E-782

FOX FILM CORPORATION
Executive Offices:
850 Tenth Avenue
New York City

BRANCH OFFICE COPY

WILLIAM FOX
MOVIETONE, SOUND AND DIALOGUE PRODUCTIONS
Contract No.....

Exchange—Mpls.

Salesman—Jack Lorentz

This agreement dated Sept 6—1929 is made between the Distributor and A. B. Muller (referred to in this agreement as the "Exhibitor"), operating the Rex Theatre, located at No.....Street, City (Town) of Maple Lake, State of Minn.

SCHEDULE

PHOTOPLAYS	Consecutive Days Run	A: Minimum Guaranteed License Fee per Photoplay	A: Gross receipts per Photoplay in excess of which Dist. shares	A: Dist. Percentage of excess	B: Synchronization and score charge	C: Aggregate of sums specified in columns A & B per photoplay	Exhibition Dates	DESCRIPTION
Prod. No.								
101 SUNNY SIDE UP ∨	2/3	$50	$200	50	$12.50	$62.50	....	Musical comedy with Janet Gaynor and Charles Farrell
102 CAMEO KIRBY ∨	2/3	50	200	50	12.50	62.50	....	Booth Tarkington's story in words and song with Norma Terris and J. Harold Murray
103 MARRIED IN HOLLYWOOD	2/3	50	200	50	12.50	62.50	....	Based on operetta by Oscar Straus featuring Norma Terris and J. Harold Murray
104 FOX MOVIETONE FOLLIES OF 1930 ∨	2/3	50	200	50	12.50	62.50	....	The 1930 edition of Movietone Follies
105 INTERNATIONAL REVUE Cheer Up and Smile ∨ Women Everywhere ∨	2/3	50	200	50	12.50	62.50	....	A sparkling revue with song, dance, music and spectacle
106 MELODIES OF 1930	2/3	50	200	50	12.50	62.50	....	An original musical comedy
107 AMERICAN BEAUTY REVUE Golden Calf ∨ High Society Blues ∨	2/3	50	200	50	12.50	62.50	....	Colorful, musical revue
108 PLAYMATES ∨	2/3	50	200	50	12.50	62.50	....	All talking & singing, with Janet Gaynor & Charles Farrell. Directed by Frank Borzage
109 The Cock Eyed World	2/3	50	200	50	12.50	62.50	....	

96

	PHOTOPLAYS		Consecutive Days Run	A: Minimum Guaranteed License Fee per Photoplay	A: Gross receipts per Photoplay in excess of which Dist. shares	A: Dist. Percentage of excess	B: Synchronization and score charge	C: Aggregate of sums specified in columns A & B per photoplay	Exhibition Dates	DESCRIPTION
Prod. No.										
	Good Intentions	V	2/3	$50	$200	50	$12.50	$62.50	....	Based on famous Viennese Operetta by Leo Fall
110	The Dollar Princess								562.50	
111	Such Men Are Dangerous	V	2/3	35			12.50	47.50	....	Elinor Glyn's story
o 112	They Had to See Paris		2/3	35			12.50	47.50	....	Will Rogers portrays lead in Homer Croy's book
113	Will Rogers No. 2	V	2/3	35			12.50	47.50	....	Will Rogers—Title to be selected
o 114	Frozen Justice		2/3	35			12.50	47.50	....	Lenore Ulric and Louis Wolheim in a melodramatic story
115	Gringo Rose	V	2/3	35			12.50	47.50	....	Leonore Ulric
o 116	Lucky Star		2/3	35			12.50	47.50	....	Janet Gaynor, Charles Farrell and Frank Borzage
117	New Orleans Frolic	V	2/3	35			12.50	47.50	....	Stupendous singing and dancing musical show
118	The Sky Hawk	V	2/3	35			12.50	47.50	....	Based on Liberty Magazine story "Chap Called Bardell"
119	The Holy Devil	V	2/3	35			12.50	47.50	....	Based on book "Rasputin, the Holy Devil"
V 120	4 Devils	V	2/3	35			12.50	47.50	....	Janet Gaynor
									332.50	
o 121	Salute		2/3	30			10.00	40.00	....	Story of Annapolis and West Point, directed by John Ford
122	The Lone Star Ranger	V	2/3	30			10.00	40.00	....	Zane Grey's story
123	Well Dressed Man	V	2/3	30			10.00	40.00	....	Featuring Victor McLaglen
124	The Cisco Kid	V	2/3	30			10.00	40.00	....	Warner Baxter — directed by Raoul Walsh
o 125	The River		2/3	30			10.00	40.00	....	Charles Farrell, Mary Duncan—Frank Borzage director—story by Tristan Tupper
126	Why Leave Home	V	2/3	30			10.00	40.00	....	Musical comedy version of "Cradle Snatchers"
V 127	The Girl From Havana	V	2/3	30			10.00	40.00	....	With Lola Lane and Paul Page. Directed by Benjamin Stoloff
128	City Girl	V	2/3	30			10.00	40.00	....	Based on stage play "Mud Turtle," with Charles Farrell
129	Christina	V	2/3	30			10.00	40.00	....	Janet Gaynor

130	Harmony at Home	V	2/3	30		10.00	40.00	....	Musical comedy version of "The Family Upstairs"
								320	
131	Seven Faces	V	2/3	25		10	35.00	....	Based on story "Apes and Angels," by Richard Connell
132	Morals	V	2/3	25		10	35.00	....	A talking drama of ever present problems
133	Budapest	V	2/3	25		10	35.00	....	Story of the gay life of Hungary
134	Girl Who Wasn't Wanted	V	2/3	25		10	35.00	....	With Lois Moran
135	Hurdy Gurdy Man	V	2/3	25		10	35.00	....	Featuring George Jessel
136	Romance of Rio Grande	V	2/3	25		10	35.00	....	Based on Katherine Fullerton Gerould's novel
137	Big Time	V	2/3	25		10	35.00	....	Story of studio life in Hollywood, directed by Kenneth Hawks
138	Passing of the 3rd Floor Back	V	2/3	25		10	35.00	....	Based on Jerome K. Jerome's famous play
139	It Might Have Happened	V	2/3	25		10	35.00	....	Sensational story featuring Paul Muni
140	The Mad Musician	V	2/3	25		10	35.00	....	South sea story with Lois Moran
								350	
141	Listen to the Band	V	2/3	20		10	30.00	....	Musical jazz melange with Lola Lane, Sharon Lynn and David Rollins
142	Black Diamond	V	2/3	20		10	30.00	....	Musical Circus story, all star cast and including Stepin Fetchit
143	The Power House	V	2/3	20		10	30.00	....	Story of Machine Age influencing our lives
144	The Last Waltz	V	2/3	20		10	30.00	....	Broadway life, past and present
145	The Bells of Toledo	V	2/3	20		10	30.00	....	A musical romance of modern Spain
146	Song of Kentucky	V	2/3	20		10	30.00	....	Story of American turf
147	Three Sisters	V	2/3	20		10	30.00	....	A dramatic story of heart throbs and smiles
148	Street Corners	V	2/3	20		10	30.00	....	A story of restless, reckless youth
								240	
								1805.	

48
6

42 Licensed

The Exhibitor agrees to charge minimum admission prices to said theatre on the respective exhibition dates of the photoplays licensed hereunder as follows: EVENINGS: Adults, Orchestra.....Balcony.....Children, Orchestra.....Balcony..... MATINEES: Adults, Orchestra.....Balcony..... Children, Orchestra.....Balcony.....

ADDITIONAL TERMS:—

OKGL

APPROVED ADDITIONAL CLAUSES

ROAD SHOWS—The Distributor shall have the right to exhibit and/or cause to be exhibited as a "roadshow," at any time prior to the exhibition thereof hereunder, such of the photoplays licensed hereunder as the Distributor may from time to time select and determine, provided, however, that such roadshow exhibitions shall be at theatres at which admission prices for evening performances, during such exhibitions thereof, of not less than one dollar shall be charged for the majority of the orchestra seats, and further provided that, except in the cities of New York and Los Angeles, not more than two of such photoplays shall be so roadshown.

If any such roadshow exhibition shall be in the city of New York, N. Y., and if the Exhibitor's theatre be situated in a territory then served by the Distributor's exchange or exchanges located in said City, the Distributor shall have the right to except and exclude from this license any such photoplay (not exceeding in the aggregate two of such photoplays) so roadshown in said City upon sending written notice to that effect to the Exhibitor not later than eight weeks after the commencement of such roadshow exhibition in such City, provided the Distributor shall by like notice except and exclude such photoplay from all other contracts containing this clause and licensing the exhibition of such photoplay in such territory. Such exception and exclusion shall not be affected in case the Distributor shall inadvertently omit to send such notice to any of such other exhibitors.

If any such roadshow exhibition shall be in the city of Los Angeles, Cal., and if the Exhibitor's theatre be situated in the territory then served by the Distributor's exchange or exchanges located in said City, the Distributor shall have the right to except and exclude from this license any such photoplay (not exceeding in the aggregate two of such

photoplays) so roadshown in said City, upon the same terms and conditions above provided for the exception and exclusion of photoplays roadshown in the city of New York.

If and when any such roadshow exhibition (except any roadshow exhibition in New York and/or Los Angeles) shall be in the territory served by the Distributor's exchange or exchanges serving the Exhibitor's theatre, such photoplay so roadshown in such territory shall forthwith be excepted and excluded from this license. The Distributor shall send written notice to that effect, to the Exhibitor within fourteen (14) days after such roadshow exhibition commences.

The Distributor may so exercise such right to except and exclude any such photoplay from time to time, in the respective territories, as above defined, in the United States. Any photoplay so roadshown in any place in the United States, and not excepted and excluded from this license as aforesaid, shall not be deemed available for exhibition hereunder until after the completion of such roadshowing of such photoplay in the United States, and such photoplay shall be exhibited hereunder as and when available.

For each photoplay that the Distributor shall except and exclude, as aforesaid, the Exhibitor is hereby granted the option to except and exclude from this license one of the other photoplays licensed hereunder, but only if the Exhibitor shall give to the Distributor written notice to that effect not later than fourteen days before the date fixed for the exhibition hereunder of such other photoplay. The Distributor may exhibit and/or license the exhibition of any and all photoplays excepted and excluded from this license by the Distributor and/or the Exhibitor, as aforesaid, when and where desired by it, free from all claims of the Exhibitor in respect thereof.

PERCENTAGE BOOKINGS—If this contract calls for payment or any part thereof computed upon the Exhibitor's gross receipts, such payment or any part thereof shall be

made daily, together with a correct itemized statement of the gross receipts of said theatre for admission thereto upon the exhibition date or dates for each photoplay for which payment is so required to be made. Should the Distributor so require, such itemized statement shall be made upon forms furnished by the Distributor. Upon such date or dates an authorized representative of the Distributor is hereby given the right to verify the sale of all tickets of admission to said theatre, and the receipts therefrom; and for such purpose shall have access to the theatre, including the box office, and also the right to examine the Exhibitor's books and records insofar as they relate to such gross receipts. The Distributor, or its authorized representative, shall also have access for a period of sixty (60) days after the receipt by the Distributor of the final box office statement, to all of the Exhibitor's books and records for the purpose of verifying such box office statement. The Distributor agrees that any information obtained by it pursuant to the provisions of this Clause will be treated as confidential, except in any arbitration proceeding or litigation in respect of this contract. The Distributor agrees, unless such representative be a regular employee of the Distributor, not to employ as such representative any person a resident of or regularly employed in the place where the Exhibitor's theatre is located, excepting with the consent of the Exhibitor.

LIQUIDATED DAMAGES, PERCENTAGE BOOKINGS—If the license fee of any photoplay licensed hereunder is to be computed either in whole or in part, upon a percentage of the gross admission receipts of said theatre, and if the Exhibitor fails or refuses to exhibit such photoplay as provided in this contract, the Exhibitor shall pay to the Distributor as liquidated damages for each day that the Exhibitor fails or refuses to exhibit such photoplay (in addition to any fixed sums payable hereunder in respect of such photoplay) a sum equal to such percentage of the average daily gross

receipts of such theatre during the period of thirty (30) operating days immediately prior to the date or dates when such photoplay should have been so exhibited, provided, however, that if the Exhibitor shall exhibit such photoplay for less than the full number of days provided for in this contract, such sum equal to such percentage shall be computed, upon a sum equal to seventy-five per cent (75%) of the gross receipts of said theatre for the last day of the exhibition thereat of such photoplay.

END OF SCHEDULE

IN WITNESS WHEREOF, the parties hereto have duly executed these presents.

No. of Pictures Offered: 48

No. of Pictures Contracted For: 48

Exhibitor: A. B. MULLER

By .....

Salesman: JACK LORENTZ

Approved

FOX FILM CORPORATION
JACK G. LEO

RIDER FOR SOUND PICTURES

This rider is in addition to and part of this Contract, which for convenience is printed hereon instead of attached hereto.

1. "Recorded Sound" as used herein shall be deemed to mean the spoken words, music, or other sounds recorded upon the positive print of a photoplay or upon a record, disc or other similar devices, separate and apart from a positive print, for use in synchronism therewith.

2. The Distributor grants to the Exhibitor and the latter accepts a license under the respective copyrights of the photoplays specified in the Schedule for which sound is recorded, and/or under any copyright which may be in force with respect to any matter included in such recorded sound, to reproduce such recorded sound in synchronism with the exhibition of such photoplays, but only at the theatre designated in the license to which this Rider is attached, and for the number of successive days in the Schedule specified.

3. This license to so reproduce such recorded sound is granted upon the Exhibitor's warranties and conditions as follows: (a) that the sound reproducing equipment installed in said theatre will operate reliably and efficiently to reproduce such recorded sound, with adequate volume and high quality, whether recorded upon the positive print or upon records, discs or other similar devices, and (b) that if copyrighted musical compositions are included in such recorded sound, the Exhibitor shall, at the time of the exhibition of such photoplays and the reproduction of such recorded sound, have an effective license from the American Society of Authors, Composers and Publishers publicly to perform the copyrighted musical compositions in the repertoire of said Society.

4. The Exhibitor agrees: (a) to return all sound records, discs or other similar devices, if any have been delivered to Exhibitor hereunder, and all parts thereof if damaged or broken, immediately following the last exhibi-

tion of the photoplay with which such sound records are used; and (b) if such recorded sound is recorded on records, discs or other similar devices, to replace with black blank positive stock, all parts removed from the positive print of any photoplay while in the Exhibitor's possession, but the Exhibitor shall have no right to remove any part of the positive print except as specifically authorized in the license to which this Rider is attached.

5. All of the provisions of the license to which this Rider is attached shall be deemed incorporated herein as if fully set forth, except that for the purposes of this Rider only, there shall be substituted for the words "photoplays" and "positive prints" the words "records, discs or other similar devices" (if any are produced and delivered), and there shall be substituted for the words "exhibition" and "exhibit" the words "reproduction" and "reproduce" where the context permits; and it is agreed that all claims and controversies arising hereunder shall be submitted for determination by arbitration, as provided in Article EIGHTEENTH of the said license.

6. The Distributor does not warrant that such recorded sound will be recorded on the positive print or on records, discs or other similar devices, the Distributor reserving the right to use any one or more methods of recording it may from time to time determine.

The Exhibitor agrees to start actual playing of the Forty-eight Movietone, Sound and Dialogue Productions under this contract not later than 2/28/30; to be played and/or paid for at the rate of not less than 4 per month.

IN WITNESS WHEREOF, the parties hereto have duly executed this Rider.

A. B. MULLER
Exhibitor

Approved

FOX FILM CORPORATION

By JACK G. LEO
Vice-President

Plaintiff's Exhibit B

[Page One of Exhibit B is identical with Page One of Exhibit A]

Form E-781 PAGE TWO

FOX FILM CORPORATION,
Executive Offices:
850 Tenth Avenue
New York, N. Y.

BRANCH OFFICE COPY

WILLIAM FOX *presents*

FOUR
CLARK AND McCULLOUGH
MOVIETONE COMEDIES

Contract No. .....

Exchange—Mpls Salesman—Jack Lorentz

This agreement dated Sept 6-1929 is made between the Distributor and A. B. Muller (referred to in this agreement as the "Exhibitor"), operating the Rex Theatre, located at No. ..... Street, City (Town) of Maple Lake, State of Minn.

SCHEDULE

Production No.	Successive Days Run	Guaranteed License Fee	Exhibition Dates — Month Dates	Description
KNIGHTS OUT	2/3	10		Two stage hands fall asleep and wake up in the days of King Arthur when they wore tin night-shirts.
ALL STEAMED UP	2/3	10		A couple of Turkish bath attendants get into hot water with the doctor's wife which burns the doctor up.
HIRED AND FIRED	2/3	10		The boys get jobs as butlers in a fashionable home and nearly wreck the place with their crazy antics.
DETECTIVES WANTED	2/3	10		Sherlock Holmes had nothing on these two gumshoes when it comes to finding the wrong clues.

Protection—Run

REMARKS

OK
JGL

END OF SCHEDULE

IN WITNESS WHEREOF the Distributor above named and A. B. Muller, the Exhibitor operating 6-7 days each week with 2-3 changes of program the Rex Theatre, located at ..... in Maple Lake, State of Minn., have executed this instrument, the 6th day of Sept., 1929, which upon acceptance by the Distributor shall be deemed to be the license to the Exhibitor for the exhibition of the photoplays specified in the Schedule in accordance with the terms hereof.

Exhibitor: A. B. MULLER

By.....
Salesman: JACK LORENTZ

Approved

FOX FILM CORPORATION
JACK G. LEO

RIDER FOR SOUND PICTURES

This rider is in addition to and part of this Contract, which for convenience is printed hereon intsead of attached hereto.

1. "Recorded Sound" as used herein shall be deemed to mean the spoken words, music, or other sounds recorded upon the positive print of a photoplay or upon a record, disc or other similar devices, separate and apart from a positive print, for use in synchronism therewith.

2. The Distributor grants to the Exhibitor and the latter accepts a license under the respective copyrights of the photoplays specified in the Schedule for which sound is recorded, and/or under any copyright which may be in force with respect to any matter included in such recorded sound,

to reproduce such recorded sound in synchronism with the exhibition of such photoplays, but only at the theatre designated in the license to which this Rider is attached, and for the number of successive days in the Schedule specified.

3. This license to so reproduce such recorded sound is granted upon the Exhibitor's warranties and conditions as follows: (a) that the sound reproducing equipment installed in said theatre will operate reliably and efficiently to reproduce such recorded sound, with adequate volume and high quality, whether recorded upon the positive print or upon records, discs or other similar devices, and (b) that if copyrighted musical compositions are included in such recorded sound, the Exhibitor shall, at the time of the exhibition of such photoplays and the reproduction of such recorded sound, have an effective license from the American Society of Authors, Composers and Publishers publicly to perform the copyrighted musical compositions in the repertoire of said Society.

4. The Exhibitor agrees: (a) to return all sound records, discs or other similar devices, if any have been delivered to Exhibitor hereunder, and all parts thereof if damaged or broken, immediately following the last exhibition of the photoplay with which such sound records are used; and (b) if such recorded sound is recorded on records, discs or other similar devices, to replace with black blank positive stock, all parts removed from the positive print of any photoplay while in the Exhibitor's possession, but the Exhibitor shall have no right to remove any part of the positive print except as specifically authorized in the license to which this Rider is attached.

5. All of the provisions of the license to which this Rider is attached shall be deemed incorporated herein as if fully set forth, except that for the purposes of this Rider only, there shall be substituted for the words "photoplays"

and "positive prints" the words "records, discs or other similar devices" (if any are produced and delivered), and there shall be substituted for the words "exhibition" and "exhibit" the words "reproduction" and "reproduce" where the context permits; and it is agreed that all claims and controversies arising hereunder shall be submitted for determination by arbitration, as provided in Article EIGHTEENTH of the said license.

6. The Distributor does not warrant that such recorded sound will be recorded on the positive print or on records, discs or other similar devices, the Distributor reserving the right to use any one or more methods of recording it may from time to time determine.

The Exhibitor agrees to start actual playing of the Clark and McCullough Movietone Comedies under this contract not later than 2/28/30; to be played and/or paid for at the rate of not less than one per month.

IN WITNESS WHEREOF, the parties hereto have duly executed this Rider.

A. B. MULLER
Exhibitor

Approved

FOX FILM CORPORATION

By JACK G. LEO
Vice-President

APPENDIX B

Extract from Petition in *United States v. Paramount*

VIII.

THE CONSPIRACY.

The defendants, each well knowing all the matters and things hereinbefore alleged, unlawfully have engaged in a conspiracy in restraint of said interstate trade and commerce in motion picture films so carried on as aforesaid by said defendant distributors, by said members of said defendant Film Boards of Trade, and by all said exhibitors of motion pictures in the United States, that is to say, in a conspiracy now here described in restraint of, and which throughout the period of time herein mentioned in fact unlawfully has restrained, and which now is restraining said interstate trade and commerce, to wit:

Since on or about July, 1922, said defendant distributors have carried on their said interstate trade and commerce in motion picture films in accordance with and pursuant to an understanding and agreement between said defendant distributors:

a. To coerce and to require every exhibitor of motion picture films in the United States to submit to arbitration any question or dispute with any member of any defendant Film Board of Trade arising under any contract licensing the exhibition of a motion picture or of motion pictures;

b. To coerce and to require every exhibitor of motion pictures in the United States to surrender and to waive the right to have any question or dispute with any member of any defendant Film Board of Trade arising under any contract licensing the

exhibition of a motion picture or of motion pictures, settled and determined by any court having jurisdiction of such question or dispute;

c. To coerce and to require every exhibitor of motion pictures in the United States to comply with any award rendered against him in any arbitration proceeding as aforesaid, without recourse or appeal to any court having jurisdiction of said question or dispute.

Since in or about July, 1922, said defendant distributors have carried on their said interstate trade and commerce in motion picture films in accordance with and pursuant to an understanding and agreement between said defendant distributors to carry out and to accomplish the aforesaid purposes and objects:

a. By refusing to enter into any contract with any exhibitor of motion pictures in the United States to license the exhibition of any motion picture and to transport, supply and deliver any motion picture film in the course of the aforesaid interstate trade and commerce, except on the terms and under the conditions (hereinafter specified) agreed upon by said defendant distributors;

b. By refusing to transport, supply and deliver in the course of the aforesaid interstate trade and commerce, any motion picture film to any exhibitor of motion pictures in the United States having a contract therefor, in the event of the failure or refusal of said exhibitor fully to comply with any term or condition (hereinafter specified) agreed upon by said defendant distributors.

All in the manner and by the means more particularly set forth hereinafter.

APPENDIX C

Decree in *United States* v. *Paramount*

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, *Petitioner,* *against* PARAMOUNT FAMOUS LASKY CORPORATION, *et al.,* *Defendants.*	E. 45-100.

DECREE

This cause having come on to be heard, and the Court having considered the evidence and the arguments of counsel, and having filed its Opinion herein on the 15th day of October, 1929, and upon motion of the petitioner by Charles H. Tuttle, United States Attorney for the Southern District of New York, and John Lord O'Brian, the Assistant to the Attorney General, and C. Stanley Thompson, Special Assistant to the Attorney General, of Counsel, for relief in accordance with the prayer of the petition, and the defendants having appeared by their attorneys, Cadwalader, Wickersham & Taft, and Edwin P. Grosvenor, Arthur L. Fisk, Jr., and Gabriel L. Hess, of Counsel; now, therefore, it is

ORDERED, ADJUDGED AND DECREED as follows:

I

That the agreement of the defendants to adopt and to use exclusively in contracting with exhibitors of motion

pictures throughout the United States the "Standard Exhibition Contract" dated May 1, 1928, which is attached to the petition herein as Exhibit "C" thereto, the adoption by the defendants of the "Rules of Arbitration" dated May 1, 1928, which is attached to the petition herein as Exhibit "G" thereto, and all the activities and agreements of said defendants by means of which they have collectively coerced adoption of and compliance with said "Standard Exhibition Contract" and said "Rules of Arbitration," constitute a conspiracy in restraint of interstate trade and commerce in violation of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," known as the Sherman Anti-Trust Act.

II

That the defendants, their officers, agents, servants and employees, and all persons acting under, through or on behalf of them, or any of them, hereby are perpetually enjoined, restrained and prohibited, individually and collectively:

1. From further engaging in or carrying out said conspiracy or any other conspiracy similar to or having the same purpose and/or effect as said conspiracy.

2. From doing any act or thing whatsoever for the purpose or with the effect of carrying out hereafter the purposes of said conspiracy, or any of them.

3. From entering into any agreement embodying the provisions of paragraph "Eighteenth" of said "Standard Exhibition Contract" dated May 1, 1928, and/or the provisions of said "Rules of Arbitration" dated May 1, 1928.

4. From enforcing, directly or indirectly, any of the provisions of paragraph "Eighteenth," entitled "Arbitration," of said "Standard Exhibition Contract" dated May 1, 1928, against any exhibitor of motion pictures in the United

States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph.

5. From enforcing, directly or indirectly, any of the provisions of Rule IV, entitled "Enforcement of Decisions of Board of Arbitration," of said "Rules of Arbitration" dated May 1, 1928, against any exhibitor of motion pictures in the United States, on account of any claim, controversy or dispute arising under or on account of any existing contract licensing the exhibition of a motion picture or of motion pictures.

6. From demanding security from any exhibitor of motion pictures in the United States because of any failure or refusal to comply with any provisions of said paragraph "Eighteenth," entitled "Arbitration," of said "Standard Exhibition Contract" of May 1, 1928, contained in any existing contract licensing the exhibition of a motion picture or of motion pictures.

7. From retaining any sum or sums heretofore received in accordance with the provisions of said paragraph "Eighteenth" of said "Standard Exhibition Contract" dated May 1, 1928, and/or said Rule IV entitled "Enforcement of Decisions of Board of Arbitration" of said "Rules of Arbitration" dated May 1, 1928, from any exhibitor of motion pictures in the United States, as security for the performance of any contract licensing the exhibition of a motion picture or of motion pictures.

8. From suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to comply with any provision of said paragraph "Eighteenth" of said "Standard Exhibition Contract" of May 1, 1928, or of said "Rules of Arbitration" dated May 1, 1928, unless there be legal cause for suspending or refusing to promptly resume such service arising independently of any of the provisions of said paragraph

"Eighteenth" of said "Standard Exhibition Contract" or of said Rule IV of said "Rules of Arbitration."

9. From continuing to act upon and from entering into any understanding, arrangement, combination, conspiracy or agreement either to refrain from entering into any contract for licensing the exhibition of a motion picture or motion pictures, or to require the deposit of security as a condition for entering into or continuing to perform any such contract which has not been breached by the exhibitor, or to fix in advance any terms or conditions upon which any defendant or any member of any defendant Film Board of Trade shall enter into any such contract,—if the purpose or effect of such understanding, arrangement, combination, conspiracy or agreement is either:

(a) To coerce or to require any exhibitor of motion pictures in the United States to submit to arbitration any claim, controversy or dispute with any defendant or with any member of any defendant Film Board of Trade, arising under any contract licensing the exhibition of a motion picture or of motion pictures; or

(b) To coerce or to require any exhibitor of motion pictures in the United States to surrender and to waive the right to have any claim, controversy or dispute with any defendant or with any member of any defendant Film Board of Trade, arising under any contract licensing the exhibition of a motion picture or of motion pictures, settled and determined by any Court having jurisdiction of such claim, controversy or dispute; or

(c) To coerce or to require any exhibitor of motion pictures in the United States to comply with any award rendered against him in any arbitration proceeding with any defendant or with any member of any defendant Film Board of Trade, arising under

or on account of any contract licensing the exhibition of a motion picture or of motion pictures, without recourse or appeal to any Court having jurisdiction of the claim, controversy or dispute occasioning said award.

III

Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree. Nor shall anything contained in this decree be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from selecting his or its own trade, from disposing of his or its own products, or from making any contracts with or without provisions relating to arbitration—all upon such terms as he or it may choose—provided such acts are done individually and without combining, conspiring or agreeing with any other defendant or any member of any Film Board of Trade.

Nothing contained in this decree shall be construed in derogation of the right of the defendants, or any of them, individually or jointly, to negotiate and to agree with any exhibitors of motion pictures on a standard form of contract to be used in licensing the exhibition of motion pictures or on any standard provision or provisions to be included in such license contracts, including reasonable provisions for the arbitration of disputes arising thereunder, if done voluntarily and without coercion, and if applied only to the parties to the negotiations and agreement.

Nothing contained in this decree shall be construed as limiting or modifying, or shall in anywise limit, restrict, modify or qualify, the Opinion filed in the companion case hereto, *"United States* v. *First National Pictures, Inc., et*

al." (In Equity No. 45-99), and the decree of the Court entered therein dismissing the petition of the Government on the merits as against the defendants herein; in which case it was held that the Rules and Regulations for the establishment and operations of a Credit Committee, annexed to said petition as "Exhibit A," as agreed to, adopted and enforced by these defendants, was not and is not in violation of the Sherman Anti-Trust Act, and that these defendants have not engaged in a combination or conspiracy to restrain trade or commerce in violation of said Act on account of their adoption and enforcement of and operation under said Credit Rules and Regulations.

IV

Jurisdiction of this cause is hereby retained for the purpose of enforcing this decree and making such other and further orders and decrees as may become necessary, and for the purpose of enabling any party hereto to apply to the Court for such further orders and directions as may be necessary or proper in relation to the carrying out of the provisions of this decree, or to apply to the Court for modification hereof if it be hereafter shown to the satisfaction of the Court that by reason of changed conditions or changes in the statute law of the United States the provisions hereof have become inadequate or inappropriate, or have become unduly oppressive to the defendants, and are no longer necessary to secure conditions in harmony with the law.

Dated: New York, January 21st, 1930.

(Sgd.) T. D. THACHER,
United States District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 47.

FOX FILM CORPORATION,

Petitioner,

v.

A. B. MULLER,

Respondent.

PETITIONER'S REPLY BRIEF

JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

CHARLES E. HUGHES, JR.,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 47.

FOX FILM CORPORATION,
Petitioner,

v.

A. B. MULLER,
Respondent.

PETITIONER'S REPLY BRIEF

We understand that respondent has elected to file no new brief on the present hearing, but to stand on his brief filed at the last term. Nothing in his arguments on the questions of the effect of the decree in the *Paramount* case, the severability of the illegal provisions of the Standard Exhibition Contract or the applicability of the decisions of this Court under the Sherman Anti-Trust Act calls for reply. The purpose of this brief is to deal briefly with certain other arguments made or suggested therein

Respondent's argument (Point V) that the contracts sued upon lack mutuality and are therefore unenforceable.

In the first place, the issue of mutuality is not available to respondent in this Court. In the amended answer respondent put in issue all of the allegations of the complaint except those describing the parties (R. 9, 2), and specially pleaded illegality (R. 9-18), lack of mutuality (R. 18-20, 12-13) and failure of petitioner to seek arbi-

tration (R. 20): In the stipulation, however, he admitted all of the essential allegations of the complaint (R. 22, 2-8), excepting only "the allegations, where made, that the failure to play or pay for said pictures were *wrongful* or *unlawful*"; and he explained this exception as follows: "The defendant claiming that said contracts were illegal in this, that they violated the Sherman Anti-Trust Act of the United States" (R. 22). This issue of illegality was thus made the sole issue in the case and the issue of mutuality was entirely ignored in the findings of fact, conclusions of law and opinions of the lower courts (R. 50-56, 64-70, 57-63, 73, 77-83, 104). When this Court reviews a decision of a state court based on an erroneous determination of a federal question, a non-federal question which has been eliminated and ignored below cannot be raised for the purpose of sustaining the decision. *Grayson* v. *Harris*, 267 U. S. 352, 357, 358; *Ward* v. *Love County*, 253 U. S. 17, 25.

But the defense of lack of mutuality was utterly without merit, in any case.

Respondent's argument is that petitioner's promise was illusory because it could exclude all of the photoplays from the license by either "roadshowing" them or withholding them from "general release" and thus avoid performing its promise to license them (Respondent's Brief, pp. 30-31). But under the contract, petitioner had no right to "roadshow" more than two of the photoplays (Main Brief, pp. 49-50, 46-48) and there was probably an implied duty to "generally release" at least some of them (see *Miller* v. *Robertson*, 266 U. S. 243, 250-252; *Southwest Dairy Products Co.* v. *Coffee & Moore*, 62 F. (2d) 174, 175 (C. C. A.,

5th Circ.); *Transcontinental Petroleum Co.* v. *Interocean Oil Co.*, 262 Fed. 278, 279-280 (C. C. A., 8th Circ.); *Wood* v. *Duff-Gordon*, 222 N. Y. 88). Moreover, as to the suggested expedient of avoiding its promise by excluding the photoplays from "general release", petitioner could accomplish this only by withholding from all exhibitors all of the forty-six photoplays contracted for by respondent. This would obviously involve a radical disruption of petitioner's production program for the year. A promise is not illusory when the promisor can avoid performance only by incurring a detriment of this sort. See *Petroleum Refractionating Corp.* v. *Kendrick Oil Co.*, 65 F. (2d), 997 (C. C. A., 10th Circ.); *Imperial Refining Co.* v. *Kanotex Refining Co.*, 29 F. (2d) 193, 195-199 (C. C. A., 8th Circ.); *Ramey Lumber Co.* v. *John Schroeder Lumber Co.*, 237 F. 39, 43 (C. C. A., 7th Circ.) certiorari denied, 242 U. S. 644; *Select Pictures Corp.* v. *Australasian Films*, 260 Fed. 296, 297-299 (D. C., S. D. N. Y.); *Green* v. *Lovejoy*, 155 Minn. 241, 193 N. W. 173; *City of Marshall* v. *Kalman*, 153 Minn. 320, 190 N. W. 597, 599; *Trainor* v. *Buchanan Coal Co.*, 154 Minn. 204, 191 N. W. 431; *Williston, Contracts*, § 104.

There can be little doubt that if the Minnesota Supreme Court had passed upon the question of mutuality it would have followed its decisions cited above rather than the earlier case of *Bailey* v. *Austrian*, 19 Minn. 535, cited by respondent (Brief, pp. 31-32), which has been frequently considered and distinguished in that court (see *City of Marshall* v. *Kalman*, *supra*, p. 599) and has been criticized elsewhere (see *In re United Cigar Stores Co.*, 8 F. Supp. 243, 244 (D. C., S. D. N. Y.); *Williston, Contracts*, § 104).

Respondent's argument (Point VI) that the Minnesota Court decided no federal question.

Respondent's defense to the effect that the contracts sued upon violate the Sherman Anti-Trust Act and are therefore illegal and void (R. 9-18, 22) presented a federal question. See *Nutt* v. *Knut*, 200 U. S. 12; *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165. In sustaining the defense, the lower court necessarily decided that federal question.

There is no merit in any implication in respondent's Point VI that this Court is bound by the state court's determination of the question of severability. If the federal question necessarily depends upon the determination of that question, and if this Court were concluded by the state court's determination thereon, its exercise of jurisdiction to review the federal question would be futile. The jurisdiction of this Court to review state court decisions is not thus fettered. See *Stanley* v. *Schwalby*, 162 U. S. 255; *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 U. S. 1, 11; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U. S. 157, 163-164. *Stanley* v. *Schwalby*, *supra*, was an action of trespass to try title to certain land. The defendants asserted that title to the land was in the United States and that they held the land under authority of the United States. The decision of the federal question depended upon whether, when the United States took a deed to the land, the attorney who acted for it had notice of a prior unrecorded deed to one McMillan. The state court concluded that the attorney did have such notice and accord-

ingly decided in favor of the plaintiff. This Court considered the question of notice, reached a different conclusion and reversed the state court's decision. In deciding that it could review the state court's conclusion on the question of notice, this Court said (pp. 278-279):

* * * * *

> "But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. * * *
>
> The decision of the Court of Civil Appeals that the United States had notice of the deed to McMillan, and therefore had no title in the land, and judgment should be rendered against their officers for both title and possession, was a decision in matter of law against the validity of the authority set up by those officers under the United States; and as such was reviewable by this court, and, being erroneous, must be reversed."

The Minnesota trial court's conclusion on the question of severability, which is set forth in the guise of a finding of fact (No. XIII, R. 55-56, Main Br. p. 9), is no more binding upon this Court than is the higher court's decision on that question. This so-called finding is so intermingled with and dependent upon the ultimate question of law as to be in substance and effect nothing more than a decision of the latter. A "finding" of this sort is not conclusive

upon this Court. See *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591-594; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668-669; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261-262; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 602; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593; *Truax* v. *Corrigan*, 257 U. S. 312, 324-325; *First National Bank* v. *Hartford*, 273 U. S. 548, 552-553; *Norris* v. *Alabama*, 294 U. S. 587, 590. Even if the so-called finding on the question of severability were a genuine finding of fact, it would not be conclusive upon this Court because it is without evidence to support it. See *Creswill* v. *Knights of Pythias*, *supra*, p. 261; *Southern Pacific Co.* v. *Schuyler*, *supra*, p. 611; *Northern Pacific Ry. Co.* v. *North Dakota*, *supra*, p. 593; *Truax* v. *Corrigan*, *supra*, p. 324.

Respectfully submitted,

JAMES D. SHEARER,
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CHARLES E. HUGHES, JR.,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 954. 47

FOX FILM CORPORATION,
Petitioner,

v.

A. B. MULLER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

ABRAM F. MYERS,
Attorney for the Respondent.

SAMUEL P. HALPERN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 954.

FOX FILM CORPORATION,
Petitioner,

v.

A. B. MULLER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

STATEMENT OF THE CASE.

The Facts.

The facts are accurately stated in the Petition for Writ of Certiorari, pp. 1-5.

Brief in Case No. 478.

When this case was before the Court earlier in the present term, Respondent filed a brief on the merits dealing

fully with all the points raised in the present petition. (See Brief for the Respondent, Case No. 478. October Term, 1934.)

These points will be dealt with in summary fashion in this brief, reference being made to the previous brief for amplification of the argument.

Reasons for Opposing the Writ.

1. The Supreme Court of Minnesota decided no Federal question.
2. The decision of the Supreme Court of Minnesota was consistent with the decisions of this Court.
3. The case is not one of general public importance.
4. The question on which the decisions of the lower Federal and State courts are in conflict is now academic.
5. The judgment of the Supreme Court of Minnesota can be sustained on grounds other than those assigned in the opinion.

ARGUMENT.

I.

The Supreme Court of Minnesota Decided No Federal Question.

When the Petitioner first sought a review of this case by writ of certiorari it claimed definite rights as against the Respondent under the decree in the case of *United States* v. *Paramount et al.*, 34 Fed. (2nd) 984; 282 U. S. 30, and alleged as ground for allowance of the writ that the Supreme Court of Minnesota had failed and refused to give full faith and credit to said decree (Petition, No. 478, pp. 1-2, 7, 15; Petitioner's Brief, No. 478, pp. 6, 23).

That petition was unopposed; but Respondent's brief on the merits exposed the fallacy of the contention that the Petitioner could have any vested rights as against the Respondent under a decree to which the latter was not a

party (Respondent's Brief, No. 478, pp. 4-6, 37-39; Petitioner's Reply Brief, No. 478, pp. 4-6).

The Petitioner now abandons its claim to a vested right under the decree in the *Paramount Case*, and this shift in its position destroys the previous action of this Court in granting a writ of certiorari as a precedent for granting the writ upon the present application.

Petitioner now contends merely that the Supreme Court of Minnesota erred in allegedly holding the Standard Exhibition Contract illegal in its entirety because violative of the Sherman Law and cites the decision and decree in the *Paramount Case* as authorities in support of that contention.

Notwithstanding the *obiter* in its opinion the Supreme Court of Minnesota actually decided no Federal question. The illegality of Clause 18 (compulsory arbitration) of the Standard Exhibition Contract was conceded by the Petitioner. The only question involved, so far as that clause was concerned, was whether it was severable. We must accept the Supreme Court's own estimate of the scope and extent of its decision:

> The question presented on this appeal is whether the arbitration clause is severable from the contract, leaving the remainder of the contract enforceable, or not severable, permeating and tainting the whole contract with illegality and making it void (Rec. 79).*

It is true that the court below, to bolster the view that the compulsory arbitration clause was not severable and possibly to save its own ratiocination, relied upon the decision and decree in the *Paramount Case*. Assuming (but not conceding) that the Supreme Court of Minnesota was incorrect in its estimate of the extent of the ruling of this

*This is from the opinion on the first presentation of the case to the Supreme Court of Minnesota; the opinion on the second presentation merely recites that "for reasons given in the previous opinion and upon authority of that opinion the judgment appealed from is affirmed" (Rec. 104).

Court in the *Paramount Case*, the fact remains that what the court below decided was a question as to the interrelation and interdependence of the several provisions of the contracts sued upon, not a Federal question of anti-trust law.

As to the correctness of the judgment of the Supreme Court of Minnesota on the question actually decided by it, regardless of the appositeness of the authorities cited, attention is invited to Respondent's Brief, No. 478, pp. 11-24. This discussion demonstrates that the compulsory arbitration clause goes to the heart of the Standard Exhibition Contract and is not severable.

II.

The Judgment of the Supreme Court of Minnesota is Consistent With the Decisions of this Court in the Paramount and Other Cases Cited by the Petitioner.

1. *The Paramount Case.* The opinion of this Court, the opinion of District Judge Thacher, and the decree of the District Court (Appendix B to the Petition herein), condemned as a violation of the Sherman Law the agreement of the distributors of motion pictures (including the Petitioner) to adopt and use exclusively the Standard Exhibition Contract, and to adopt the Rules of Arbitration, and all the activities and agreements of said distributors whereby they had collectively coerced adoption of and compliance with said Contract and Rules (Respondent's Brief, No. 478, pp. 6-11).

The specific injunctions were limited to outlawing the compulsory arbitration clause and the rules; but this does not alter the finding of the decree that the agreement to adopt and use the Standard Exhibition Contract and the Arbitration Rules "constitutes a conspiracy in restraint of interstate trade and commerce in violation of the Act of Congress of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restrains and monop-

olies' known as the Sherman Anti-Trust Act" (Decree, Paragraph I).

The provisos of the decree relied upon by the Petitioner (Petition, pp. 4-5), saving to the distributors rights not inconsistent with the provisions of the decree, did not determine the question of severability or preclude the courts of Minnesota from deciding that question as they saw fit. Obviously those provisos were inserted in the decree merely to protect the distributors against a charge of contempt in asserting in any other case whatever legal rights consistent with the decree they might possess (Respondent's Brief, No. 478, pp. 4-6).

2. *Other Cases.* The decision of the Supreme Court of Minnesota is directly in line with the decision of this Court in *Continental Wall Paper Co.* v. *Voight,* 212 U. S. 227, and is not inconsistent with the decisions in *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Wilder Mfg. Co.* v. *Corn Products Ref. Co.,* 236 U. S. 165, and *A. B. Small Co.* v. *Lamborn & Co.,* 267 U. S. 248.

The test whether a contract can be enforced by a party to an illegal conspiracy is whether the contract is merely collateral to or part and parcel of such conspiracy (Respondent's Brief, No. 478, pp. 6-11).

The contracts sued upon in the present case are in no sense collateral to the illegal conspiracy to which the Petitioner was adjudged a party. These contracts are an essential part, and the visible manifestations of, the conspiracy. They were forced upon the Respondent as a result of the conspiracy since he could not obtain the necessary pictures with which to conduct his theatre on any other form of contract (Rec. pp. 39-40; Respondent's Brief, No. 478, pp. 6-11, 24-28).

III.

The Case is Not One of General Public Importance.

Respondent concedes that there is a diversity of opinion among certain lower Federal and State courts as to whether the illegality of Clause 18 invalidated the Standard Exhibition Contract in its entirety. However, Clause 18 was abandoned by the distributors of motion pictures promptly upon the filing of the decree in the *Paramount Case* on January 21, 1930. The record does not disclose that there are any cases involving this question now pending in the courts. The presumption is that the present protracted litigation is the only one remaining and that the point at issue now is of interest only to the parties to this record.

We submit that the Court would not be justified in reviewing this case merely to cure a conflict on an academic question which, under the decree in the *Paramount Case*, can not again arise. And the writ being discretionary, it is respectfully suggested that it would be an undue hardship to subject this Respondent to further proceedings after four years and a half of litigation.

IV.

Assuming (but Not Conceding) that the Court Below Erred in the Particulars Cited in the Petition, Other Grounds Exist on Which the Judgment Must Be Affirmed.

The Respondent's Amended Answer (Rec. 9-21) sets up a number of defenses including the claim that the contracts sued upon—

1. Were a part of a conspiracy in violation of the Sherman Law (Rec. 10-12, 18).

2. Were in and of themselves in restraint of trade (Rec. 12-17, 18).

3. Were unilateral (Rec. 18-20).

By stipulation the contracts were introduced in evidence

and these additional grounds of defense are apparent on the face thereof.

As to the illegality of the contracts wholly apart from the provision specifically enjoined in the *Paramount Case*, we refer to Respondent's Brief, No. 478, pp. 24-28.

As to the lack of mutuality in said contracts we refer to Respondent's Brief, No. 478, pp. 29-37.

CONCLUSION.

It is respectfully submitted that the petition herein does not disclose any adequate or appropriate reason for granting a writ of certiorari in this case and that, therefore, the said petition should be denied.

ABRAM F. MYERS,
Attorney for the Respondent,
Securities Building,
Washington, D. C.

SAMUEL P. HALPERN,
Of Counsel.

May, 1935.

FILE COPY

No. 47

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Supreme Court of the United States

OCTOBER TERM, 1934.

~~No. 475.~~

FOX FILM CORPORATION,

Petitioner,

vs.

A. B. MULLER,

Respondent.

RESPONDENT'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 478.

FOX FILM CORPORATION,

Petitioner,

vs.

A. B. MULLER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

RESPONDENT'S BRIEF.

STATEMENT OF THE CASE.

I. INTRODUCTION.

The petitioner, Fox Film Corporation, invoked the jurisdiction of the District Court for the Fourth Judicial District of Minnesota against the respondent, A. B. Muller, to recover the stipulated rentals for certain motion pictures licensed by the petitioner for exhibition by the respondent in his motion picture theatre in Maple Lake, Minnesota, which pictures were not accepted or exhibited by the respondent (R. 1-9).

No issue was raised as to the execution of the contracts or

the failure of the respondent to accept and exhibit the pictures (Stipulation R. 22; Complt. R. 2-7). The defense was based on the illegality and lack of mutuality of the contracts sued upon.

The printed portions of the contracts sued upon were substantially similar to the Standard Exhibition Contract condemned by this Court under the Sherman Anti-Trust Act in *Paramount vs. United States,* 282 U. S. 30 (R. 22).

II. Defenses Set Up in the Answer.

Respondent's amended answer attacked the contracts on three grounds:

1. That they were a part of a conspiracy among the distributors of motion pictures (including the petitioner) in violation of the Sherman Act (R. 10-12, 18).

2. That the provisions of said contracts were in and of themselves in restraint of trade (R. 12-17, 18).

3. That the contracts were unilateral (R. 18-20).

Respondent denies that the only defense urged was that the contracts were illegal and unenforceable because they contained the compulsory arbitration clause condemned in the *Paramount Case,* as claimed by the petitioner (Br. 3).

On the contrary, respondent's amended answer attacks the contracts in their entirety, as well as the manner in which they were imposed upon him. No right or privilege under the decision or decree in the *Paramount Case* was specially set up or claimed by the respondent. Neither did respondent offer the decree in evidence as he was authorized to do by Section 5 of the Clayton Act (Act of October 15, 1914, 38 Stat. 730; U. S. Code Tit. 15, Ch. I, Sec. 16).

The issues in the present case are much broader than those raised by the Government in the *Paramount Case.*

III. Decisions of the State Courts.

Notwithstanding the breadth of the amended answer, both the State District Court (R. 57-63, 73) and the State Supreme Court (R. 77-83) chose the easy way and held the contracts illegal on the authority of *Paramount vs. United States* and the several State and Federal decisions to the effect that the ruling of the Court in the *Paramount Case* invalidated not merely the compulsory arbitration clause of the Standard Exhibition Contract but the entire contract, for the reason that said clause is not severable from the remainder of the contract.

The decision of the Supreme Court of Minnesota is reported in 255 N. W. Rep. 845; the decision of the District Court is not reported.

IV. Issue Raised by the Petitioner.

Petitioner takes the position, in effect, that the decree of the United States District Court for the Southern District of New York in *United States vs. Paramount,* to which neither the respondent nor any representative body of motion picture exhibitors was a party, is *res judicata* in the present case, and that the Supreme Court of Minnesota misinterpreted said decree and hence failed to give full faith and credit to the same (Pet. for Certiorari, 1-2, 7, 15; Br. 6, 23).

ARGUMENT.

POINT I.

THE DECREE IN THE PARAMOUNT CASE IS NOT A LIMITATION ON THE POWER OF THE COURTS OF MINNESOTA TO RELIEVE THE RESPONDENT AGAINST THE MONOPOLISTIC AND ONE-SIDED STANDARD EXHIBITION CONTRACT.

1. *The decree is not res judicata.* This follows for the simple reason that there is neither identity of parties or of issues in the two proceedings. *Paramount vs. United States* was a suit in equity brought by the Government to enjoin the carrying out of a conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act (Act of July 2, 1890, 26 Stat. 209; U. S. Code Tit. 15, Ch. I, Secs. 1, 4). It is admitted that the petitioner, Fox Film Corporation, "was one of the defendants named in said action and said opinion of the United States District and Supreme Court" (Stip. R. 22). The respondent, Muller, was not, however, a party to the proceeding either directly or by representation.

Moreover, the petition filed by the Government, while attacking broadly the conspiracy among the several distributor-defendants, was not as far-reaching in its attack on the Standard Exhibition contract as the answer in the present case. Unlike this answer said petition did not attack provisions of the Standard Exhibition contract (other than the compulsory arbitration clause) as illegal in and of themselves, and made no point of the unilateral nature of the contract.

2. *Paragraph 3 of the decree does not validate the contract.* Respondent challenges the claim made by petitioner that the proviso in Paragraph 3 of the decree validates and makes enforceable provisions of the Standard Exhibition

contract other than the compulsory arbitration clause. Said proviso reads:

> "Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree" (Appendix B to Petitioner's Brief, p. 35).

The obvious meaning of this proviso is that it shall not be considered a contempt of court for any of the defendants to vindicate or seek to vindicate whatever legal rights they may possess. Clearly the District Court in the *Paramount Case* could not determine the rights of persons not parties to that suit or preclude other courts from adjudicating such rights.

Sub-paragraph 8 of Paragraph II, also cited by the petitioner (Br. 8), is similarly explained. This provision enjoins the defendants from suspending or refusing promptly to resume service to any exhibitor because of any failure or refusal to comply with the compulsory arbitration clause. This is but a corollary to the provisions specifically enjoining the enforcement of the arbitration clause. It is ridiculous to suppose that this injunctive provision conferred any rights on the defendants or denied any rights to persons not parties to the suit.

The claim of the petitioner, if sustained, would lead to monstrous results. The rights of all citizens and the powers of all other courts in important Anti-Trust cases would be subject to the determination of United States District Courts in cases brought by the Federal Government wherein

the decrees are usually settled upon such terms and conditions as the lawyers representing the Government for the time being may see fit to demand or yield.

Point II

The Courts of Minnesota Rightfully Refused to Aid the Petitioner in Its Efforts to Enforce the Illegal Standard Exhibition Contract Against the Respondent.

1. *The entire contract is unenforceable under the decision in the Paramount Case.* We submit that the petitioner, not the courts below, has misinterpreted the scope and effect of the opinions and decree in the *Paramount Case*. The case not only is not a limitation on the power of the State courts to declare the entire Standard Exhibition Contract invalid, but is an authority for so ruling.

The contracts sued on are not collateral to the illegal conspiracy among the motion picture distributors—including the petitioner—condemned by this Court. These contracts are an essential part—the visible manifestations—of that conspiracy. The conspiracy consisted in an unlawful agreement to impose upon the theatre owners this uniform contract.

This Court said:

> "The record discloses that ten competitors in interstate commerce, controlling sixty per cent of the entire film business, have agreed to restrict their liberty of action by refusing to contract for display of pictures except upon a Standard Form which provides for compulsory joint action by them in respect of dealings with one who fails to observe such a contract with any Distributor, all with the manifest purpose to coerce the

Exhibitor and limit the freedom of trade" (282 U. S. 30, 41).

District Judge Thacher in rendering the decree thus affirmed by this Court, said:

> • • • "One can hardly imagine a more direct restraint upon trade than an agreement between competitors in an open market not to trade except upon terms which they have fixed in advance" (34 Fed. (2d) 984, 988).

The decree, Paragraph I, provides:

> Ordered, Adjudged and Decrees as follows:
>
> "That the agreement of the defendants to adopt and to use exclusively in contracting with exhibitors of motion pictures throughout the United States the 'Standard Exhibition Contract,' dated May 1, 1928, which is attached to the petition herein as Exhibit 'C' thereto, the adoption by the defendants of the 'Rules of Arbitration,' dated May 1, 1928, which is attached to the petition herein as Exhibit 'G' thereto, and all the activities and agreements of said defendants by means of which they have collectively coerced adoption of and compliance with said 'Standard Exhibition Contract' and said 'Rules of Arbitration,' constitutes a conspiracy in restraint of interstate trade and commerce in violation of the Act of Congress of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' known as the Sherman Anti-Trust Act."

Paragraph II provides, in part, as follows:

> "That the defendants, their officers, agents, servants and employees, and all persons acting under, through

or on behalf of them, or any of them, hereby are perpetually enjoined, restrained and prohibited, individually and collectively

1. From further engaging in or carrying out said conspiracy or any other conspiracy similar to or having the same purpose and/or effect as said conspiracy.

2. From doing any act or thing whatsoever for the purpose or with the effect of carrying on hereafter the purposes of said conspiracy or any of them."

The remaining injunctive provisions are aimed particularly at Paragraph 18 (the compulsory arbitration clause) of the Standard Exhibition Contract and Rule IV of Arbitration Rules. But the fact remains that the conspiracy to agree upon and enforce the Standard Contract and the Arbitration Rules was the gist of the offending against the Sherman Act.

The refusal of the Minnesota courts to enforce the Standard Contract—the reason for and product of the illegal conspiracy—was consistent with and not contrary to the opinions and decree in the *Paramount Case.*

2. *The contracts sued on are not collateral to but are the embodiment of the illegal conspiracy.* The courts of Minnesota could not enforce the Standard Exhibition Contract without sanctifying the illegal conspiracy which gave it birth and aiding one of the conspirators in oppressing one of its victims.

While courts will not refuse to enforce contracts which are purely collateral to an illegal conspiracy, they will not give effect to contracts which are essential parts of such a conspiracy. The case of *Continental Wall Paper Company vs. Voight,* 212 U. S. 227, relied on by the lower courts (R.

61, 83) makes clear this distinction and is a perfect authority in this case.

In the course of this notable opinion Mr. Justice Harlan said (pp. 260-261):

"The present case is plainly distinguishable from the *Connolly Case*. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation and could not participate in the profits of its business. *His* contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, *nor part of nor in execution of any general plan or scheme that the law condemned.* The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that deals with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the *Connolly Case* was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that the defense could not be sustained either upon the principles of the common law or under the Anti-Trust Act of Congress.

The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the Court to enforce a contract for the sale and purchase of goods, which, *it is admitted by the*

demurrer was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme." (Italics by Mr. Justice Harlan.)

The rule has been more succinctly stated by Mr. Justice Van Devanter in *A. B. Small & Company vs. Lamborn & Company*, 267 U. S. 248, 252, as follows:

> "As has been pointed out in prior cases, there is nothing in the Anti-Trust Act which invalidates such a collateral contract or relieves the buyer from his obligation under it * * * It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense."

This same distinction was made by Mr. Chief Justice White in *D. R. Wilder Mfg. Co. vs. Corn Products Refining Co.*, 236 U. S. 165, in the excerpts from his opinion quoted in petitioner's brief, pages 16 to 18.

Thus do all of the authorities cited and relied on by the petitioner (Br. 15) distinguish themselves from the case at bar. Another point of distinction between this case and *Connolly vs. Union Sewer Pipe*, 184 U. S. 540, and the *Wilder Case, supra*, is that the motion pictures here in question were not accepted or exhibited by the respondent, hence there is no possible question of a recovery on *quantum meruit*.

Another point of similarity between the present case and *Continental Wall Paper Co. vs. Voight* is that counsel for the respondent at the trial, evidently impressed by the connection between the seller and the buyer in the latter case, proved and the petitioner now concedes (Br. 4) that the president of the Motion Picture Theatres of the Northwest, representing that Association, of which the respondent is a

member, was one of the exhibitor leaders mentioned in the opinion of District Judge Thacher in the *Paramount Case* as having participated in the formulation of the Standard Exhibition Contract.

Point III.

Paragraph 18 of the Standard Exhibition Contract Being Admittedly Illegal, the Remainder Is Unenforceable For the Reason That Said Paragraph Goes to the Heart of the Contract and Is Not Severable.

1. *The illegality of Paragraph 18 is established and conceded.* While petitioner has labored to narrow the scope and effect of the decision in the *Paramount Case* in other respects, it does not deny that said decision rendered Paragraph 18 (the compulsory arbitration clause) illegal (Stip. R. 22-23). Petitioner has taken pains to point out that "in this litigation (it) made no claim under Paragraph Eighteenth" (Br. 4).

Petitioner's position is, in effect, "Strike out Paragraph 18 and enforce the rest of the contracts."

This overlooks the fact that Paragraph 18, whatever its other infirmities, afforded the respondent a valuable means —and the only readily available means—for protecting his rights under the contracts here involved. The rule may be, in certain classes of cases, as contended by petitioner (Br. 11) "that the bad parts do not affect the good"; but this does not apply where removal of the bad also removes an important part of the consideration for making the contract, or where the good is inseparably connected with and dependent upon the bad.

2. *Paragraph 18 afforded respondent the only readily available means for protecting his rights under the con-*

tracts.[1] The Standard Exhibition Contract was aptly described by Mr. Justice McReynolds as "an elaborate document." The complications of the business are such as to preclude simplicity. A great many contingencies, unknown to other industries must be provided for. Each such provision can and does give rise to controversies between the distributors and exhibitors. But the distribution and exhibition of pictures can not halt pending the settlement of such controversies. If the distributor refuses to furnish the exhibitor with a picture that he feels he is entitled to, he can not litigate the matter for weeks or months. A picture can become stale and lose its box office value in a very short period of time. The only remedy that can be of value to the exhibitor must be readily available and speedily consummated. The arbitration clause was a valuable part of the contract so far as the exhibitor is concerned. The rules under which this arbitration was conducted and awards in favor of distributors enforced were unfair. Except for this, Paragraph 18 provided an ideal method of settling disputes and was immensely valuable to the exhibitors.

The importance of the arbitration clause to the exhibitors will be appreciated when it is considered that the damage to the distributor for failure on the part of the exhibitor to play a picture in accordance with his contract is the rental fixed in the contract for that picture. Liquidated damages are not provided for the exhibitor in case the distributor fails or refuses to deliver a picture contracted for. The exhibitor is left practically remediless since the damage suffered is the wholly speculative difference between what the

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[1]Petitioner has kindly printed the contract in readable type as Appendix A to its brief, and reference will be made to this rather than to the copy in the record which is printed in such fine type as to be almost illegible.

picture in question might have drawn and what some makeshift substitute actually drew. Under Paragraph 18 the exhibitor in such circumstances could appeal to the Arbitration Board and have his right to the picture established while the same is fresh and a matter of current interest in his community.

Because of its importance to the exhibitor Paragraph 18 undoubtedly constituted a major inducement for entering into the contracts on which petitioner stakes its case.

3. *The relation of Paragraph 18 to other paragraphs of the Standard Exhibition Contract demonstrates non-severability.* Every other provision of the contract is directly related to Paragraph 18. With Paragraph 18 removed from the contract the rights of the exhibitor under the remaining provisions are largely dependent upon the indulgence of the distributor. The following is an enumeration of problems arising under the other paragraphs which in the absence of some method of arbitration can not be settled within permissible limits of time and the means of the average small exhibitor:

Paragraph First: Inclusion of unwarranted provisions in the Standard Form by means of riders or otherwise.

Paragraph Second: (a) Identification of the pictures included in the contract.

(b) Determination of rights with respect to pictures not generally released during the term of the contract.

Paragraph Third: Questions as to alleged unauthorized exhibitions.

Paragraph Fourth: Questions relating to timeliness of payments.

. . . . . .

Paragraph Sixth: Vitally important questions as to

"run" (*i. e.*, first, second, or third in a competitive situation) and "protection" (*i. e.*, the period of time which must elapse before a subsequent run theatre can follow a prior run).

Paragraph Seventh: Disputes as to the timeliness of the delivery and return of prints, including damage to prints while in the exhibitor's possession. This paragraph expressly provides that damages caused by delay in the return of prints "shall be determined by Arbitration as provided for in Article Eighteenth hereof."

Paragraph Eighth: The multitudinous controversies which can and do arise out of the complicated provisions for the selection or designation of play dates.

Paragraph Ninth: Replacement of film damaged or lost while in the exhibitor's possession.

Paragraph Tenth: Disputes growing out of attempts by the distributor to substitute other pictures for the ones actually sold.

Paragraph Eleventh: Disputes growing out of the assignment of contracts upon the sale of a theatre.

Paragraph Twelfth: Disputes arising out of attempts by the distributor to control the exhibitor's advertising and his use of advertising accessories.

Paragraph Thirteenth: Disputes arising out of the inclusion of paid advertising in the pictures themselves.

Paragraph Fourteenth: Disputes arising out of attempts by the distributor to cast upon the exhibitor the burden of all taxes imposed or based upon the "delivery" as well as the "exhibition" of pictures.

Paragraph Fifteenth: Disputes growing out of attempts by the distributor to regulate the admission prices of the theatre.

Paragraph Sixteenth: Disputes growing out of delays in

exhibition or delivery due to causes beyond the control of the parties.

* * * * * * * * *

Paragraph Twentieth: Disputes arising out of the exercise by the exhibitor of his right to exclude certain pictures from the block upon payment of one-half of the rental, including disputes as to the computation of such rentals on percentage bookings.

Paragraph Twenty-first: Disputes as to pictures deemed offensive to the public because of racial or religious subject-matter, this provision also being expressly coupled with the arbitration clause.

Paragraph Twenty-second: Disputes as to whether an application for a contract has been accepted within the periods specified.

What has been said with reference to the foregoing provisions of the contract applies equally to the approved additional clauses (Pet. Br., App. "A," pp. 21-26).

4. *The better reasoned decisions are to the effect that Paragraph 18 is not severable.* The cases so holding are as follows:

Majestic Theatre, Inc., vs. United Artists, 43 Fed. (2) 991;
Vitagraph vs. Theatre Realty Co., 50 Fed. (2) 907;
Fox Film vs. C & M Amusement Co., 58 Fed. (2) 337;
Universal Film Exchange vs. West (Miss.), 141 So. 293;
Fox Film vs. Tri-State Theatres (Idaho), 6 Pac. (2) 135;
United Artists Corp. vs. Piller (N. D.), 244 N. W. 20;
United Artists Corp. vs. Odeon Building, Inc. (Wisc.), 248 N. W. 784.

In *Fox Film vs. C & M Amusement Co., supra*, it was held

that the illegal elements are inseparable from the contract, the court saying on page 339, as follows:

> "The fraudulent and illegal elements permeating these contracts must, it seems to the court, taint and void the entire contract so far as it may affect or bind one who through the medium of coercion has become a party to it.
>
> The defendant in this case does not find itself in the collateral position, as was the case in the line of decisions wherein the principle was laid down that one purchasing and receiving the goods and afterwards learning that the seller was a party to an illegal combination and refused to pay for them could avoid the contract. *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679; *Continental Wall Paper Co. vs. Louis Voight & Sons Co.*, 212 U. S. 227, 29 S. Ct. 280, 53 L. Ed. 486; *Small Co. vs. Lamborn & Co.*, 267 U. S. 248.
>
> After having the value and benefit of the purchased goods, the courts granted protection to the seller, notwithstanding his illegal situation, on the basis that otherwise the buyer would receive something for nothing."

In *Universal Film Exchange vs. West, supra,* in holding that the entire contract is illegal and void, the court said:

> "In the determination of the question whether the illegal portion of a contract may be severed from the remainder, it is not permissible to simply strike out and wholly disregard the illegal portion as if it had never been a part of the agreement. *McMullen vs. Hoffman,* 174 U. S. 639, 19 S. Ct. 839, 43 L. Ed. 1117. On the contrary, the illegal as well as the legal portions must be

taken into view and thereupon the question, to state it tersely, is whether there is a vital connection between the illegal portion and the other portions. Another statement of the rule is that even though it may be possible to sever the illegal from the legal portion of the contract, yet, if there are no means by which to ascertain whether the promise was induced by the legal or illegal portion, the entire contract will be held illegal if one of the material elements thereof is unlawful. 3 *Elliott Contracts,* pp. 350, 351. Here we have a case before us which falls not only within the rule as last stated, but which comes within the rule of vital connection first mentioned; for it is expressly stipulated in the contract, and here we call particular attention to the third paragraph of the eighteenth or arbitration section of the contract copies above, that, unless the said unlawful provision shall be complied with by the exhibitor, the distributor shall have the right to terminate the contract. In other words the contract expressly provides that, unless the exhibitor shall be bound by and shall observe the illegal portion of the agreement, the distributor shall not be bound by any of the said contract, but may wholly terminate it. Therefore the illegal portion inseparably and vitally connects itself with all the other parts, and, in consequence, the illegal portion infects the entire contract with illegality."

In *Fox Film Corp. vs. Tri-State Theatres, supra,* it was held that the execution of this contract within prohibition of the Sherman Anti-Trust Act in whole or in part, is wholly unlawful.

The court in its opinion, stated:

"The contention on which the appellant bases its case

is the claim that 'The arbitration clause is separable from the other parts of the contract and its illegality neither affects the remainder of the contract nor relieves the defendant from its obligation to perform the legal covenants to receive and pay for motion pictures.'

In conclusion, as we understand the law, a contract which is within the prohibition of the Sherman Anti-Trust Act in whole or in part is not only illegal but its execution is unlawful. The act of executing it is a misdemeanor under the laws of the United States. The complaint here virtually alleges that a part of the contract in suit is illegal as prohibited by the Sherman Anti-Trust Act. If so, its execution was unlawful."

On petition for rehearing, the court said:

"In this case the petition does not come to the real point. In the case of *United States vs. Paramount-Famous Lasky Corporation, supra,* the action was to restrain further use of the contract. The court held that the contract, including clause 19 (sic) as written, was in violation of the Sherman Anti-Trust Act, and further held that by striking out that clause the contract would then not offend. In this case, however, the action is on contract. The complaint alleges that the clause was not stricken out, that it was part of the contract as executed, but further alleges that the contract with that clause in it is illegal as in restraint of trade and violative of the Sherman Anti-Trust Act. We have simply held that, if this is so, the contract is not an illegal contract, but was unlawfully executed and therefore unenforceable. That is the main point in the case and petition for rehearing avoids that point all the way through."

In *United Artists vs. Piller* (N. D.), *supra*, on the question whether or not the illegal portion of the contract was severable from the rest of the contract, the court said:

> "On the contrary, the illegal as well as the legal portions must be taken into view, and thereupon the question to state it tersely, is whether there is a vital connection between the illegal portion and the other portions. Another statement of the rule is that even though it might be possible to sever the illegal from the legal portion of the contract, yet, if there are no means by which to ascertain whether the promise was induced by the legal or illegal portion, the entire contract will be held illegal if one of the material elements thereof is unlawful. 3 *Elliott Contracts*, pp. 350, 351. Here we have a case before us which falls not only within the rule as last stated, but which comes within the rule of vital connection first mentioned; for it is expressly stipulated in the contract, and here we call particular attention to the third paragraph of the eighteenth or arbitration section of the contract copies above, that, unless the said unlawful provision shall be complied with by the exhibitor, the distributor shall have the right to terminate the contract. In other words, the contract expressly provides that, unless the exhibitor shall be bound by and shall observe the illegal portion of the agreement, the distributor shall not be bound by any of the said contract, but may wholly terminate it. Therefore the illegal portion inseparably and vitally connects itself with all the other parts, and, in consequence, the illegal portion infects the entire contract with illegality."

In *United Artists Corporation vs. Odeon Building, Inc.*

(Wisc.), *supra*, after quoting with approval the above quotation from *United Artists vs. Piller*, 244 N. W., the Wisconsin Supreme Court said:

> "It appears to us that the weight of authority, as well as sound reason, supports the conclusions, first, that the arbitration clause is unquestionably illegal; and, second, that its inclusion so influenced the making of the contract as to render its separation from the legal portion of the contract improper. The fight made to sustain the arbitration clause in the litigation which culminated in *Paramount-Famous Lasky Corporation vs. United States, supra*, would seem to indicate its general importance to the combination plan. The arbitration clause provides, that, in the event that the exhibitor shall fail or refuse to submit to arbitration, the distributor may at its option, demand security for its protection, and upon failure to comply with such demand, may suspend service or terminate the contract. It seems clear, from these provisions, that the arbitration plan embodied in the contract is so closely connected and tied into the remainder of the contract that it must be said that the illegality permeates the whole contract."

This question is also discussed in a well written article on this subject appearing in the Yale Law Journal for the month of January, 1933, beginning at page 431; the writer of such article, after discussing all of the cases decided on this point pro and con, reaches the conclusion that the majority of the decisions on the subject are to the effect that the contract is entirely illegal and void, by reason of being in violation of the Sherman Anti-Trust Act.

5. *Contrary decisions considered.* In the case of *Columbia Pictures vs. Bi-Metallic Investment Co.*, 42 Fed. (2d)

873, the decision of the court is upon a demurrer of the defendant (exhibitor) to the plaintiff's complaint. The contract was not before the court. The arbitration clause was not involved, since it was not referred to in the complaint, and the court therein stated that unless the arbitration clause is brought to the attention of the court by pleadings not yet filed, it was not necessary to a decision on the demurrer. In other words, the court in that case did not pass upon the legality of the entire contract.

In *Paramount-Famous Lasky Corporation vs. National Theatre Corp.*, 49 Fed. (2) 64, plaintiff filed a complaint against the defendant, alleging breach of the contract to exhibit certain pictures, which it was alleged plaintiff furnished, and for which the defendant agreed to pay. The defendant demurred to the complaint, and claimed the plaintiff had failed to comply with a condition precedent, to-wit, to arbitrate the claim, as provided in Section 18 of the contract. On appeal, the Circuit Court of Appeals held that arbitration was not a condition precedent, since it had been held to be illegal, and accordingly overruled defendant's demurrer.

The case of *Metro-Goldwyn-Mayer vs. Bijou Theatre*, 50 Fed. (2d) 908, is not material to the issues herein involved, since that case was an action to restrain the defendant from infringing plaintiff's copyright.

In the case of *Fox Film Corp. vs. Buchanan* (La.), 136 So. 197, the Supreme Court of Louisiana erroneously proceeded upon the theory that the action was one to recover for goods sold and delivered, overlooking entirely that the contract sued upon was executory, and that the action was prosecuted for the alleged refusal of the defendant to accept and use the photoplays.

In *Fox Film Corp. vs. Ogden Theatre Co.* (Utah), 17 Pac.

(2) 294, the court erroneously assumed that the Thacher decree provided that the arbitration clause alone was illegal.

In none of the cases above referred to, was the entire decree of Judge Thacher before the court.

However, the entire decree was before the trial court in this case, and in his memorandum, Judge Guilford concludes as follows (R. 62-63):

> "It is claimed, however, by plaintiff that language contained in the decree of the Federal District Court of New York contains a severing clause which indicates the intention of the court that the injunction should not be construed as preventing the distributor from enforcing the contract, in so far as such enforcement is consistent with the decree. This severing clause, so-called, would be clearer if after the words 'contractual obligation' there appeared the words 'theretofore made.' But if such were the intention of the Federal District Court it does not appear from the decision of the Supreme Court of the United States affirming that decision that the latter court intended to depart from its well settled rules as to the effect of a violation of the anti-trust law on contracts, as declared in the *Continental Wall Paper* and other cases. Before we can conclude that the effect of the decision was such as plaintiff claims it ought to be very clear. In the Idaho case, the court, after reviewing the opinions of both the trial and the Supreme Court, concludes that the Supreme Court, at least, intended to hold void the entire contract.
>
> I have, therefore, come to the same conclusion as is expressed in the concluding paragraphs of the Idaho and North Dakota decisions, to-wit:

A contract which is within the prohibition of the Sherman Anti-Trust Law in whole or in part is not only illegal but its execution is unlawful.

Attention is called to a note in the Yale Law Journal, January, 1933, Volume 42, No. 3, in which the cases are reviewed. The author gives as one of the reasons for concluding that the contract is not severable the reason that the arbitration clause is of the essence of the contract, in that it provides the machinery for regulation of relations between the distributor and exhibitor; that since the avowed purpose of the entire contract and arbitration agreement is to establish the sphere of self-government for the industry, it seems beyond doubt that the arbitration clause is vital and of the essence of the contract.

I have therefore concluded plaintiff is not entitled to recover in an action on the contract. Possibly where films have been delivered an action may lie in *quantum meruit.*"

6. *Necessity for fair arbitration recognized by N. R. A.* Although the record was closed before this development, it is believed that counsel for the petitioner will indulge the statement that following affirmance of Judge Thacher's decree by this Court the distributors adopted and made available to the exhibitors a form known as "Optional Standard License Agreement" containing an eminently fair arbitration clause to be executed separately at the option of the respective parties. The Code of Fair Competition for the Motion Picture Industry, approved by the President November 27, 1933, provides, in Division F, Part 1:

"The so-called Optional Standard License Agreement (1933) negotiated by Exhibitors and now being used by

a large number of Distributors shall be the form of license contract to be used by Distributors for licensing the exhibition of motion pictures, unless the parties mutually agree that a different form be used * * *."

Part 2 provides:

(a) "The arbitration of all disputes between Exhibitors and Distributors arising under any exhibition contract, if the parties shall agree on arbitration, shall be in accordance with the arbitration clause of the so-called Optional Standard License Agreement provided for in this Code, except as the provisions of such clause may be modified by the provisions of this Code."

We believe this development is persuasive that an arbitration clause is so essential a part of an exhibition contract that the business can not be conducted without one.

Point IV.

The Contracts Sued on Were Imposed by a Conspiracy of Motion Picture Distributors Controlling Upwards of 60 Per Cent of the Production and Distribution of Motion Pictures in the United States. Respondent Was Compelled to Buy Pictures on This Standard Form Containing a Vital Clause Which Is Admittedly Illegal as Well as Many Other Provisions Equally Oppressive.

1. *Respondent had no choice as to the form of contract.* Mr. Muller, lessee of the theatre in Maple Lake and the village furniture dealer, undertaker and plumber (R. 26, 41), testified that he was compelled to do business with parties to the conspiracy condemned in the *Paramount Case* and that he was unable to obtain pictures from any of those

companies on other than the Standard Form (R. 27-28, 39). The trial court made the following findings, among others, which were in effect sustained, or at least, not disturbed by the Supreme Court of Minnesota:

V.

"That prior to the making of said contract, as well as at the time of entering into same, said plaintiff, together with other producers and distributors of motion pictures, were members of said Motion Picture Producers and Distributors of America, and controlled 60% of the production and distribution of motion pictures in the United States produced and distributed for shipment and sale and commerce between the several states, and that all of said times, the said members of said Motion Picture Producers and Distributors of America, including plaintiff, together with other producers and distributors of motion pictures, being all members of the several Film Boards of Trade, organized and controlled by the said members of the Motion Picture Producers and Distributors of America, including this plaintiff, controlled at least 98% of the production and distribution of motion pictures in the United States, produced and distributed for shipment and sale and commerce between the several States.

VI.

That at all times herein mentioned, all exhibitors, including the defendant, engaged in exhibiting such motion pictures in theatres throughout the United States, were of necessity compelled to do business with said plaintiff, and said other producers and distributors controlling the production and distribution of said motion pictures in order to obtain motion pictures to carry on their business.

VII.

That in the year 1928, the plaintiff herein and said other producers and distributors of motion pictures so controlling 98% of the production and distribution of motion pictures for distribution and commerce between the several states, did agree with each other and with some exhibitors, including this defendant, through their duly authorized representatives, that they would distribute their product and motion pictures throughout the United States in a particular manner, to-wit, by means of the said standard exhibition contract and none other, and that no one would be permitted to sell, license or purchase or exhibit any motion pictures so produced and distributed within the United States, except under said plan and in conformity with the terms of said contract.

VIII.

That pursuant to said agreement among said producers and distributors, including plaintiff, it was then agreed by and among said producers and distributors, including plaintiff, that the terms upon which any of said distributors would sell, and any exhibitors, including defendant, would be permitted to purchase from said distributors, should be embodied in a form of contract known as the Standard Exhibition Contract; that none of the said distributors would sell or permit the exhibition of their product in the United States, except under the terms of said Standard Exhibition Contract, to be executed by the particular distributor and exhibitor in each instance; that the distributor and exhibitor were each required to warrant that the said predetermined terms were all contained in such con-

tract, and that no provision inconsistent with such predetermined terms was contained therein."

These findings, it is submitted, bring the entire contract within the condemnation of the Sherman Act. As stated by Judge Thacher in the *Paramount Case*, 34 Fed. (2d) 984, 989, "it is when agreements are sought to be imposed on others regardless of their wishes by coercive combinations having the power to say 'Take what is offered or get nothing' that they become illegal."

2. *The Standard Exhibition Contract contains many provisions in addition to Paragraph 18 which "unduly interfere with the free exercise of their rights by those engaged * * * in trade and commerce."* The words quoted in the caption are from the decision of this Court in *United States vs. Colgate & Co.*, 250 U. S. 300, 307, and were cited by Mr. Justice McReynolds in his opinion in the *Paramount Case*. They exactly describe many of the provisions in the contracts sued upon and which the Minnesota courts refused to enforce.

Without recounting the provisions paragraph by paragraph as was done under the preceding point, it is enough to point to a few of the more flagrant provisions of the contract:

A. Provision whereby the distributor is relieved of its obligation to deliver pictures contracted for by the expedient of (1) roadshowing such pictures or (2) delaying their general release (Par. Third-b).

B. Provision requiring exhibitors to pay in advance for all pictures (Par. Fourth).

C. Fixing the terms of "protection" (Par. Sixth).

D. Provision requiring exhibitor to feature the dis-

tributor's name in all newspaper and other advertising, to lease all advertising accessories from the distributor, and prohibiting subsequent run exhibitors to advertise pictures until the completion of their run in prior run theatres (Par. Twelfth).

E. Requiring exhibitors to pay all taxes based on the "delivery" as well as the "exhibition" of pictures (Par. Fourteenth).

F. Prescribing the admission prices to be charged by the exhibitors at their theatres (Par. Fifteenth; also Schedule, Pet. Br. App. A, p. 21).

G. Limiting valuable right to exclude pictures to exhibitors buying "an entire group of feature photoplays offered by the distributor to the exhibitor at one time, and not otherwise"—thus virtually compelling the exhibitor to buy the entire block of pictures offered by the distributor (Par. Twentieth).

These uniform provisions have been drafted by the distributors solely in their own interest. The manifest purpose was to crack the whip over the exhibitors, control the operating policy of the theatres and monopolize the playing time on the screens. Any variation as between distributors as regards these important provisions would have been a major competitive factor. No exhibitor in his right mind would have executed these contracts if more favorable contracts had been available. But there was no choice. It was "Take what is offered or get nothing."

We submit that, wholly aside from Paragraph 18, there is scarcely a provision in the Standard Exhibition Contract, imposed as it was by force, that does not reek with illegality or which a court could in good conscience enforce.

Point V.

The Contracts Sued on Are Unenforceable Because Wholly Lacking in Mutuality.

1. *Even if the supposed Federal question was erroneously decided, the judgment below should be affirmed for the reason that it can be sustained upon other grounds than those assigned by the Minnesota courts.*

Assuming but not conceding that the Supreme Court of Minnesota was mistaken in the reason assigned for its judgment in this case, it would be manifestly unfair to reverse that judgment if it can be sustained on other grounds not involving any conceivable Federal question. It is possible for courts to be correct in their judgments and wrong in their reasoning.

In *Walter A. Wood Co. vs. Skinner*, 139 U. S. 293, this Court speaking through Mr. Justice Brown said:

> "It is well settled by a long series of adjudications that, to give this Court jurisdiction by writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but *that its decision was necessary to the determination of the case*, and that it was actually decided, or that the judgment rendered could not have been given without deciding it." *De Saussure vs. Gaillard*, 127 U. S. 216. (Italics ours.)

In *Waters-Pierce Oil Co. vs. Texas*, 212 U. S. 86, 106, Mr. Justice Day, speaking for the Court, said:

> "In thus deciding the Court of Civil Appeals did not determine a Federal question, nor necessarily decide one adversely to the plaintiff in error, controlling in

character, if it appears upon this record *that the verdict and judgment can stand upon other grounds,* free from objection, so far as Federal rights are concerned." (Italics ours.)

2. *The Standard Exhibition Contract is one of mutual promises; the promises of the exhibitor are made enforceable, the promises of the distributor are not, hence there is no mutuality.* In this case, the consideration moving from and to each party to the contract is the promise of the other party to the contract. In other words, respondent promises to accept certain pictures and to pay certain rentals therefor, in consideration of certain promises made by petitioner, all of which are contained in the contracts. Respondent makes a promise and his promise is consideration for petitioner's promise.

A promise is a good consideration for a promise, if it imposes upon the promissor some binding legal obligation. If if does not impose a legal obligation, then it is not a binding promise and hence not a good consideration.

13 *Corpus Juris,* p. 329, states the rule as follows:

> "A promise is a good consideration for a promise, provided always that it imposes some legal liability on the person making it. If it imposes none, then it can not be a consideration."

The contract in question (Second B) provides for the leasing of certain photoplays on condition that such photoplays having been produced, are generally released by it within a certain time therein designated. It also, under the heading "roadshows" reserves the right to roadshow any pictures produced and generally released, and to except the pictures not generally released or so roadshown from its obligation to furnish same to the respondent.

In other words, if the petitioner, as the producer and distributor of a photoplay, goes ahead and produces photoplays and discovers that the photoplays as produced are good money-making pictures, it has the right under the contract to roadshow such pictures, and by the terms of the contract, such pictures do not have to be furnished, and are excepted from the contract.

Again, if the picture should not be roadshown, but if for some reason petitioner decides not to generally release the picture during the life of the contract, it is not under any obligation to furnish the same to the respondent. It may delay the general release of a picture for a short time, put it in the next year's offering and sell it the following season at a higher rental. One party to this contract, the petitioner, has the power of determining whether it shall be bound; it has the power to say whether it will perform or will not perform; it has the right to live up to the contract, or to get out of the contract, as it sees fit.

Wherein is the petitioner unconditionally bound to perform? How can it be forced to furnish a picture if it decides to roadshow it or refuses to generally release it? Where is it under any obligation to perform, if it decides it is not to its interest to perform? Where is there mutuality of consideration? What then is the consideration for the respondent's promise? The fact of the matter is that there is none. It follows, therefore, that these contracts, lacking mutuality of consideration, are unenforceable.

The promise made by the petitioner is an illusory one.

It has been said by the Supreme Court of Minnesota in the case of *Bailey vs. Austrian*, 19 Minn. 535 (465):

> "If this set of facts establishes any contract, it is a contract of mutual promises; that is to say, the sole con-

sideration for defendant's promise to supply is plaintiff's promise to purchase, and vice versa.

The general rule (with exceptions not important in this instance) is "that a promise is not a good consideration for a promise, unless there is an absolute mutuality of engagement, so that each party has a right at once to hold the other to a positive agreement."

This must be taken as the law of Minnesota whose courts were invoked by the petitioner in this case.

The case at bar is a case of mutual promises. But the case at bar goes one step further, and the contracts contain the additional clause whereby one of the contracting parties can release itself from all obligations at its own convenience and upon its own election, while the other party has no such corresponding right. The courts have uniformly held that such contracts are void and of no effect.

The general rule is stated in 13 *Corpus Juris* 337-8, as follows:

"Where one person reserves the absolute right to cancel or terminate the contract at any time mutuality is absent, this rule being frequently applied to contracts of sale."

In the case of *Ellis vs. Dodge Bros.*, 237 Fed. 860, the court had for consideration an agreement which provided that it would expire by limitation on June 30, 1915, or may be cancelled by the manufacturer or dealer upon 15 days' written notice. The defense of lack of mutuality was raised in that case. The court held that the contract was void on two grounds, one of which was lack of mutuality with reference to the following provision in the contract: "This agreement shall expire by limitation June 30, 1915, or may be

cancelled by the manufacturer or dealer upon 15 days' written notice."

The court said:

> "This provision would be fatal to this agreement, as a binding contract between the parties, if it were not otherwise objectionable * * * To agree to do some thing and reserve the right to cancel the agreement at will is no agreement at all."

In *Nicholl vs. Wetmore,* 156 N. W. 319 (Ia.), the contract provided that the dealers might cancel the contract at any time, if in their judgment the sub-dealer was not properly promoting the sale of the cars, but no corresponding right was given to the sub-dealer. The court said:

> "The court speaks of the alleged contract as a 'jug-handled' affair, but which, even if it had been complete, there would be no mutuality of enforceable obligation. By section 3 of the instrument defendant reserved the absolute right to cancel the same if at any time, in their judgment, the defendant was not properly promoting the sale of their cars, but no corresponding right was reserved to the plaintiff * * * That contracts of this nature are clearly lacking in mutuality has been held in *Velie vs. Kopmeier,* 114 C. C. A. 284, 194 Fed. 324; *Oakland vs. Ind. Auto Co.,* 121 C. C. A. 319, 201 Fed. 499; *Goodyear vs. Koehler,* 159 App. Div. 116, 143 N. Y. Supp. 1046."

In the case at bar, the Fox Film Corporation also reserves the right to cancel the contracts whenever in their judgment it is desirable to do so by the simple expedient of not supplying the pictures.

The court, in the case of *Killebrew vs. Murray,* 151 S. W. 662 (Ky.), had for its consideration a contract involving a

mining lease. It was a phosphate mining lease for 10 years, which did not give the lessor the right to terminate the lease within that time, but permitted the lessee to begin work of prospecting and mining at any time within 10 years, and also contained the provision that the lessee might quit and cancel the contract or lease whenever he chooses to do so, upon notice to the lessor that the land does not contain paying qualities of phosphate in his opinion. The court, in its opinion, said:

> "Such contracts lack the mutuality essential to their validity. A unilateral executory contract is, in law, a *nudum pactum*, and is unenforceable. Where it is left to one of the parties to an agreement to choose whether he will proceed or abandon it, neither can specifically enforce it in equity."

In the *Great Northern Ry. Co. vs. Sheyenne Tel. Co.*, 145 N. W. 1062 (N. D.), it was held:

> "Contracts between a railroad company and a telephone company which give the latter the privilege of placing a telephone in two depots in consideration of free service for it, are not mutual where they are subject to termination at will of one with a stipulation that no corresponding right should be exercised by the other."

In this case the court also said:

> "In law actions mutuality is determined as of the time the contract is entered into."

In *American Agricultural Chemical Co. vs. Kennedy*, 48 S. E. 868 (Va.), the court said:

> "A contract by which plaintiff agrees to sell fertilizer, and defendants agree to buy, having no other consideration than their mutual promises, and providing that

plaintiff may cancel it at any time, is void for lack of mutuality of engagement, so that defendants may refuse to purchase, the plaintiff manufactures the fertilizer and puts it in sacks marked for them and makes tender thereof."

In discussing the rule of mutuality of obligation, with specific reference to contracts which involve a clause that one of the parties may cancel the contract, the court said in the case of *Combs vs. Hazard Ice and Storage Co.*, 290 S. W. 1034:

"No rule is more firmly settled than that mutuality of obligation is essential to the validity of an executory contract. Hence, where it is left to one of the parties to choose whether he will proceed or abandon the contract, and he may do so at any time, without incurring any liability thereunder, the contract is not binding upon either."

In *Powell vs. Ward*, 280 S. W. 151, the court said:

"Contract leasing half interest in coal mine, under which lessee was to pay royalty for coal sold of more than $3.00 a ton, he to have right to operate mine so long as he could make profit on coal, and right to turn it back to lessors on notice, held unilateral and unenforceable by him, except as already executed."

In the case of *Shortell vs. Evans-Ferguson Co.*, 277 Pac. 519 (Cal.), the court discusses the general rule which is stated in 13 *C. J.* 337, and which is quoted in the forepart of this memorandum, and on the question of the validity of such contracts, says:

"The general rule is stated in 13 *Corpus Juris* 337, supported by reference to a number of decisions, that

where one party reserves the right of cancellation, mutuality is absent * * * The right of appellant to withdraw from the agreement is clear. There was no mutuality of consideration provided for. On one hand, it was proposed to bind respondent in absolute terms to perform her part, while appellant's performance was made conditional * * * If a promise does not offer an enforceable legal right or forbearance it is not a consideration * * *."

In *City vs. Fidelity & Deposit Co.*, 267 Fed. 181, the court had for consideration a contract entered into by the city for the sale of certain bonds, which it contemplated selling on a certain day, but reserved to itself the right to terminate the contract, provided it did not dispose of the bonds. The court, in its opinion, stated as follows:

"The purpose of the city, as made apparent by the language of Section 11, was to reserve the right to terminate the contract, provided it did not dispose of the bonds, and in the exercise of such right, to escape any liability to any one upon any claim or demand whatever. A contract of such nature could not be enforced; it lacks mutuality."

Bankers Trust Co. vs. Farmers and Merchants Bank, 136 S. E. 143 (Ga.), was a case involving the construction of a contract entered into between the bank for the salary of its fiscal agent who could terminate the contract at any time, upon notice that he had become dissatisfied with the management or operation of the bank. He had rendered certain promotion services involved in this agreement. The court said:

"The contract described in third certified question is lacking in mutuality, because of the provision that the fiscal agent, one of the parties to the contract, may at

any time terminate the contract, should it 'become dissatisfied with the management and operation of said bank.'"

The provisions of the Standard Form discussed under Points III and IV further illustrate the one-sided nature of the document. We ask that the Court on this point consider not only the lack of mutuality in the undertakings of the parties, but all other features as well. Only through the combined action of the distributors controlling the pictures which exhibitors must have to operate their theatres could such a document be imposed on the exhibitors.

Point VI.

The Supreme Court of Minnesota Resolved No Federal Question But Merely Decided That an Admittedly Illegal Provision of the Standard Exhibition Contract Was Not Severable From the Remainder of the Contract.

The question submitted to and determined by the Supreme Court of Minnesota is thus defined in the opinion of that Court:

> "The question presented on this appeal is whether the arbitration clause is severable from the contract, leaving the remainder of the contract enforceable, or not severable, permeating and tainting the whole contract with illegality and making it void" (R. 79).

The illegality of Paragraph 18 is conceded. Petitioner has been most emphatic in asserting that this paragraph is no longer in the contract. "A practical deletion" is the phrase used in the application for reargument in the court below (R. 85). It is submitted that a determination of the rela-

tionship between this deleted paragraph and the remaining paragraphs involves no more than an interpretation of the contracts themselves and presents no Federal question.

This is evident from the labored effort to establish jurisdiction in Point IV of petitioner's brief (p. 23). Counsel is driven to the contention that the Supreme Court of Minnesota failed or refused to give full faith and credit to the decree in the *Paramount Case*. But that decree is not *res judicata* as we have already demonstrated (Point I, subhead 1); and the provisions relied upon do not have the effect for which petitioner contends as has also been demonstrated (Point I, subhead 2).

Obviously there can be no question of failure to give full faith and credit to a decree which is not binding on both parties. An examination of the decisions cited by petitioner in support of its contention makes this clear:

Knights of Pythias vs. Meyer, 265 U. S. 30;

St. Louis K. C. & C. R. Co. vs. Wabash R. Co., 217 U. S. 247.

The present case is clearly distinguishable from the above cases for the reason that the respondent, Muller, was not a party to the decree in the *Paramount Case* either by representation, succession or intervention.

The claim that the Supreme Court of Minnesota in deciding the question of severability (the only question submitted to it) failed or refused to follow the decisions of this Court in certain enumerated cases, even if true, does not raise a Federal question reviewable under Section 237 of the Judicial Code (U. S. Code, Sec. 344). But as shown under Point II, subhead 2 of this brief, the claim is without merit. The decision of the court below is wholly consistent with the decisions of this Court in the *Sewer Pipe, Wall Paper,*

Wilder and Small Cases, all of which were considered under Point II.

CONCLUSION.

It is respectfully submitted that the writ of certiorari herein should be dismissed for want of jurisdiction, or, in the alternative, that the judgment of Supreme Court of Minnesota should be affirmed.

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SAMUEL P. HALPERN,
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January 30, 1935.

SUPREME COURT OF THE UNITED STATES.

No. 47.—October Term, 1935.

Fox Film Corporation, Petitioner, *vs.* A. B. Muller. } On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[December 9, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is an action brought in a Minnesota state court of first instance by the Film Corporation against Muller, to recover damages for an alleged breach of two contracts by which Muller was licensed to exhibit certain moving-picture films belonging to the corporation. Muller answered, setting up the invalidity of the contracts under the Sherman Anti-trust Act. It was and is agreed that these contracts are substantially the same as the one involved in *United States* v. *Paramount Famous Lasky Corp., et al.*, 34 F. (2d) 984 (aff'd 282 U. S. 30); that petitioner was one of the defendants in that action; and that the "arbitration clause", paragraph 18 of each of the contracts sued upon, is the same as that held in that case to be invalid. In view of the disposition which we are to make of this writ, it is not necessary to set forth the terms of the arbitration clause or the other provisions of the contract.

The court of first instance held that each contract sued upon violated the Sherman Anti-trust Act, and dismissed the action. In a supplemental opinion that court put its decision upon the grounds, first, that the arbitration plan is so connected with the remainder of the contract that the entire contract is tainted, and, second, that the contract violates the Sherman Anti-trust law. The state supreme court affirmed. 192 Minn. 212. We granted certiorari, 293 U. S. 550; but, when the case was called for argument, it appeared that no final judgment had been entered and the writ was dismissed as improvidently granted. 294 U. S. 696. The case was then remanded to the state supreme court; and, the judgment having been made final, and again affirmed by the state supreme court on the authority of its previous opinion, — Minn. —, we allowed the present writ. 295 U. S. —.

In its opinion, the state supreme court, after a statement of the case, said (192 Minn. at p. 214):

"The question presented on this appeal is whether the arbitration clause is severable from the contract, leaving the remainder of the contract enforceable, or not severable, permeating and tainting the whole contract with illegality and making it void."

That court then proceeded to refer to and discuss a number of decisions of state and federal courts, some of which took the view that the arbitration clause was severable, and others that it was not severable, from the remainder of the contract. After reviewing the opinion and decree of the federal district court in the *Paramount* case, the lower court reached the conclusion that the holding of the federal court was that the entire contract was illegal; and upon that view and upon what it conceived to be the weight of authority, held the arbitration plan was inseparable from the other provisions of the contract. Whether this conclusion was right or wrong we need not determine. It is enough that it is, at least, not without fair support.

Respondent contends that the question of severability was alone decided and that no federal question was determined by the lower court. This contention petitioner challenges, and asserts that a federal question was involved and decided. We do not attempt to settle the dispute; but, assuming for present purposes only that petitioner's view is the correct one, the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger* v. *State of Missouri*, 13 Wall. 257, 263, and has been reiterated in a long line of cases since that time. It is enough to cite, in addition to the *Klinger* case, the following: *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U. S. 157, 163-165; *Petrie* v. *Nampa &c. Irrig. Dist.*, 248 U. S. 154, 157; *McCoy* v. *Shaw*, 277 U. S. 302; *Eustis* v. *Bolles*, 150 U. S. 361.

Whether the provisions of a contract are non-severable, so that if one be held invalid the others must fall with it, is clearly a question of general and not of federal law. The invalidity of the arbitration clause which the present contracts embody is conceded. It

was held invalid by the federal district court in the *Paramount* case, and its judgment was affirmed here. The question, therefore, was foreclosed; and was not the subject of controversy in the state courts. In that situation, the primary question to be determined by the court below was whether the concededly invalid clause was separable from the other provisions of the contract. The ruling of the state supreme court that it was not, is sufficient to conclude the case without regard to the determination, if, in fact, any was made, in respect of the federal question. It follows that the non-federal ground is adequate to sustain the judgment.

The rule announced in *Enterprise Irrig. Dist.* v. *Canal Co., supra,* and other cases, to the effect that our jurisdiction attaches where the non-federal ground is so interwoven with the other as not to be an independent matter, does not apply. The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there. The non-federal question in respect of the construction of the contracts and the federal question in respect of their validity under the Anti-trust Act were clearly independent of one another. See *Allen* v. *Southern Pacific Railroad Co.*, 173 U. S. 479, 489-492. The case, in effect, was disposed of before the federal question said to be involved was reached. *Chouteau* v. *Gibson,* 111 U. S. 200; *Chapman* v. *Goodnow,* 123 U. S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.

Writ dismissed for want of jurisdiction.

The CHIEF Justice took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.